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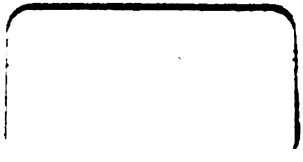

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MASSACHUSETTS REPORTS

199

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

MAY 1908 — OCTOBER 1908

HENRY WALTON SWIFT

REPORTER

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OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

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Hon. WILLIAM CALEB LORING.
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ATTORNEY GENERAL

Hon. DANA MALONE.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

J. WHEELOCK SPRING & another, administrators, *vs.* CITY OF CAMBRIDGE.

Middlesex. March 10, 1908. — May 20, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Tax, Sale. *Statute*. *Contract*, To reimburse purchaser at invalid tax sale. *Estoppel*. *Evidence*, Relevancy and materiality. *Words*, "Purchaser."

The collector of taxes of a city, at an auction sale of real estate for non-payment of taxes for a certain year conducted in accordance with the formalities prescribed in R. L. c. 13, struck off certain real estate to one B., and, at a sale held subsequently on the same day for non-payment of the taxes for the next year, struck off the same real estate to one H. At the suggestion of the collector, H. and B. agreed that H. should be written into the deed as the highest bidder and the purchaser at the first sale, and the collector so made the deed and H. paid the amount for which B. had bid in the real estate and received a deed. No deed was given to B. H. died and his administrator, after having made the offer in writing required by R. L. c. 13, § 44, to surrender and discharge the deed or to assign and transfer to the city all the right, title and interest which formerly were H.'s in the premises, as the collector might elect, brought an action of contract under the above named section of the statute to recover from the city the amount paid to the collector by H., alleging that H. was the purchaser at the sale and, by reason of an error, omission or informality therein, had had no claim upon the property sold. *Held*, that H. was a "purchaser" within the meaning of § 44, that he acquired no title as against the owner of the real estate and had no claim upon the property sold, that the plaintiff did not have to prove an ouster in order to

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maintain the action, and was not estopped by H.'s agreement with B., made at the suggestion of the collector, to prove the facts upon which he relied.

In an action against a city by a purchaser at a tax sale to recover under R. L. c. 18, § 44, the amount paid by the plaintiff for a tax title, it appeared that, by reason of an error, omission or informality in the sale, the plaintiff had no claim upon the land, that, in accordance with the statute, the plaintiff had offered in writing to surrender and discharge his deed and to assign and transfer to the city all his right, title and interest in the premises, as the collector of taxes might elect, but that his offer had been refused. The defendant offered in evidence, and the judge excluded, a quitclaim deed dated after the making and the refusal of the offer to the collector, but before the bringing of the action, which purported to convey to a third person all the right, title and interest of the plaintiff in the premises described in the collector's deed to him. *Held*, that the evidence should have been admitted, since the statute contemplates that one seeking its aid to recover money paid for such an invalid deed shall be in a position to "surrender and discharge" the deed or to assign and transfer to the city such right, title and interest in the premises as he procured from the tax sale transaction, if the collector shall so elect.

CONTRACT under R. L. c. 18, § 44, to recover money paid by the plaintiff's intestate to the defendant for land informally sold and conveyed to him. Writ in the Superior Court for the county of Middlesex dated March 30, 1907.

There was a trial before *Pierce*, J., without a jury, who made findings of fact and found generally for the plaintiff. His findings of fact and the questions of law raised by his rulings and the exceptions of the defendant thereto are stated in the opinion.

G. A. A. Pevey, for the defendant.

J. W. Allen, for the plaintiffs.

KNOWLTON, C. J. The plaintiffs are the legal representatives of Henry C. Hubbard, late of Winchester, deceased, and they bring this suit to recover money paid by him for a deed of real estate sold by the collector for non-payment of taxes. The action is brought under the R. L. c. 18, § 44, upon an averment that, by reason of errors, omissions and informalities in the sale, they have no claim upon the property sold.

It appears by the findings of the judge of the Superior Court that the property was sold by the collector of taxes for the tax of the year 1902, and was struck off to one Baker, who was represented by an agent, one Roberts, who made the bids for him, and afterwards, on the same day, was sold again for the tax of the year 1903 to the plaintiffs' intestate, Hubbard. The collector did not require of Baker, or of his agent Roberts, a deposit of any sum to insure payment of the purchase money.

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Neither Baker nor any one in his behalf paid the price, or any part of it, within twenty days after the sale, and no deed of the property was ever made to Baker or to any one for him. Within a few days after the sale, it was agreed between Baker, acting through his agent Roberts, and Hubbard, that he, Baker, should give up his right to have a deed of the premises, and that a deed for his purchase should be made to Hubbard and he be named as the grantee and purchaser therein. This arrangement was made with the knowledge and at the suggestion of the collector, who thereupon inserted in the deed the name of Henry C. Hubbard as the highest bidder for the property and the grantee in the deed, and Hubbard paid the taxes and intervening charges for which the sale was made. The deed was delivered to him and by him duly recorded. The auction sale was on May 25, 1904, and the delivery of the deed was on June 7, 1904.

On May 23, 1906, the plaintiffs offered to surrender and discharge the deed, and assign and transfer to the city of Cambridge all the right, title and interest which Hubbard acquired by reason of the conveyance. It was admitted by the defendant that this offer and tender fulfilled the requirements of the R. L. c. 13, § 44. At this time the plaintiffs, as representatives of the estate of Hubbard, had, in that capacity, all the interest in the premises that was conveyed to Hubbard by this deed. The collector of taxes refused to accept the offer of the plaintiffs and the money never has been repaid.

The substitution by the tax collector of the name of Hubbard for that of Baker in the deed was entirely outside of his authority as an officer of the law. He had a mere naked power to sell real estate for non-payment of taxes and to convey a title to the purchaser. He could not lawfully do it in any other way than that which the law prescribes. The strictness of the rule which requires an exact compliance with the provisions of the statute has often been stated. *Harrington* v. *Worcester*, 6 Allen, 576. *Reed* v. *Crapo*, 127 Mass. 39. *Holt* v. *Weld*, 140 Mass. 578. *Keene* v. *Houghton*, 19 Maine, 368. *Sibley* v. *Smith*, 2 Mich. 486. *Chandler* v. *Spear*, 22 Vt. 388. *Brown* v. *Veazie*, 25 Maine, 359, 362. We think it plain that, as against the owner of the real estate, Hubbard acquired no title and had no claim upon the property sold. Under the R. L. c. 13, § 47, on the fail-

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ure of Baker to pay for the property, the city became the purchaser, and the deed should have been made to it accordingly.

The question arises whether R. L. c. 18, § 44, applies to an error of this kind. Some of the defendant's requests for rulings in regard to the meaning of the term "purchaser" and the term "grantee" refer to this question. Under this section the "purchaser" is given rights, if he has no claim upon the property sold. We think the word used here means the person who is treated as the purchaser and acts as the purchaser at the consummation of the collector's sale. Such a sale is ordinarily made up of the contract entered into at the auction and the delivery of the deed of conveyance afterwards. Hubbard was the grantee in the deed and the person described in it as the purchaser. We are of opinion that he was within the meaning of the word "purchaser," as used in § 44. He was not the purchaser within the meaning of the word as used in § 48, although he was the grantee in the deed. The purchaser and the grantee ought to be, and are presumed to be, the same person. The judge rightly dealt with the requests for rulings touching this subject.

The defendant says that the plaintiffs cannot maintain an action under this section in the absence of evidence of an ouster, or of disturbance by the holder of a paramount title. This contention is sufficiently answered by the plain language of the statute requiring the city to pay when the conditions stated exist, without any reference to an ouster or disturbance of possession.

There is no ground for the defendant's contention that the plaintiffs are estopped to prove the facts on which they rely. The statute was intended to allow such proof, and to give relief in cases of this kind.

The defendant offered in evidence a deed, by which it appeared that, after making the offer to the defendant, and long before the bringing of this action, the plaintiffs conveyed away, for a valuable consideration, all their right, title and interest in the premises described in the deed from the collector. This evidence was excluded, subject to the defendant's exception.

We are of opinion that it should have been admitted. By the terms of the statute it is only "upon such surrender (of the deed) and discharge or assignment and transfer" that such a

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city or town is required to pay. The statute contemplates that the city shall have the benefit of the deed, for such use as can be made of it, before being required to pay.

It is said that, if the purchaser has no claim under it, it is of no consequence, and the city suffers nothing from its being outstanding in the hands of a third party. But the statute is framed upon a different theory. If nothing more, the outstanding deed is a cloud upon the title, and it might be important to the city, in reference to future proceedings, to have the cloud removed. It is possible, in reference to the enforcement of rights under § 47, in connection with the mistake made by the collector and others, that the possession and control of this deed might be serviceable to the city. While the statute contemplates that the deed is invalid, it also contemplates that the control of it shall be held by the city, and that the city shall not repay the money without obtaining it. One seeking the aid of this statute to recover money paid for such a deed should not convey to another his rights under the deed. Without determining at this stage of the case questions that may arise hereafter, we hold that this ruling was erroneous.

Exceptions sustained.

JOHN H. COBCORAN & others *vs.* BOARD OF ALDERMEN OF CAMBRIDGE & others.

Middlesex. March 20, 1908. — May 20, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Tax, Assessment, Street Watering, Abatement. *Statute. Certiorari.*

R. L. c. 26, §§ 26, 27, providing for a tax upon estates abutting upon streets which a city has determined to water, is not unconstitutional in not giving the owner of such an estate an opportunity to be heard in regard to the assessment, since § 27 provides that such assessment in many specified particulars shall be like the annual tax upon property and "shall be a part of the tax for that year on such" estates, "but the assessors shall make no abatement thereof except upon the recommendation of the board or officer by whom," under § 26, a list, containing information for their guidance in making the assessment, was certified to them; and thus by implication gives to persons assessed a right to be heard before the assessors upon an application for an abatement, and also a right, upon an appli-

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cation for a recommendation of an abatement to the board or officer who certified the list to the assessor, to be heard upon all questions affecting the validity and amount of the assessment, and it is the duty of such board or officer to give the recommendation, and the duty of the assessors to make the abatement, if, upon a hearing, the assessment seems to be unwarranted or excessive.

An assessment of a tax for street watering, assumed to have been made under R. L. c. 26, §§ 26, 27, upon vacant, unimproved land is illegal, and, upon application made to the assessors for an abatement and to the board or officer, whom the board of aldermen had designated to certify to the assessors for their guidance in assessing the tax the lists specified in § 26, for a recommendation of an abatement, it would be the duty of such board or officer to make the recommendation, and of the assessors to make the abatement.

Where assessments of a tax for street watering have been made under R. L. c. 26, §§ 26, 27, according to the linear feet of frontage upon the streets watered of various parcels of land of different sizes and shapes, situated in different portions of a city under different conditions of travel, occupation and population and upon streets of varying widths, while full effect must be given in all ordinary cases to the legislative determination that such assessment, where conditions are similar, is as nearly proportional and equal as is reasonably practicable, nevertheless, if it appears that an assessment made in this way will impose upon any property a liability substantially in excess of the special benefits conferred, such an assessment cannot lawfully be made.

At the hearing of a petition for a writ of certiorari to quash an assessment of a tax for street watering assumed to have been made under R. L. c. 26, §§ 26, 27, by a city, it appeared that the total tax assessed for this purpose was $34,000, of which $564 was assessed upon estates of the petitioners, that the estates of the petitioners were parcels of land of different sizes and shapes, situated in different portions of the city, under different conditions of travel, occupation and population and on streets of varying widths, that $19 of the tax was assessed illegally on the land of one of the petitioners because the land was vacant and unimproved. *Held*, that there was not shown such a departure from the correct application of the statute as to require the quashing of the entire assessment as illegal, and that the petitioners had no remedy except by proceedings for an abatement.

Assuming to act under the provisions of R. L. c. 26, § 26, the board of aldermen of a city, without first having determined by vote that the whole or any part of the streets of the city should be watered at the expense of the abutters, passed an order on March 5 of a certain year estimating the expense of the watering as $40,000, directing that four fifths of the expense be borne by abutters and that the rate of the tax assessed be four cents per linear foot of frontage upon the abutting estates, and designating the superintendent of streets as the officer to determine the amount of the assessment upon each estate and to make the lists required by § 26 and to commit them to the assessors. The vote was approved by the mayor on March 7. On April 2 the board of aldermen adopted an order determining that "all the public ways within the limits of the city" should be watered. At some time before September 16, the exact date not more definitely appearing, the superintendent of streets made the lists required by § 26 but kept them in his office, which was directly under that of the assessors, where the latter had access to them. The assessors had upon their own books all of the details contained in the superintendent's books. The assessors made an assessment upon abutters amounting to $34,278.58 on August 31, at the rate of four cents per linear foot. On September 16 the superintendent of streets gave to the assessors a certificate that "the amount of street watering assess-

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ment as shown by the detailed books in this office is $84,278.58," and stated the amount to be assessed by wards. It appeared that the net expense of such watering was $38,440.66, which included the value of water used for the purpose from the city's waterworks, $8,278.52. *Held*, that no such irregularity appeared in the assessment as to justify the issuance of a writ of certiorari quashing it.

In making the estimate of the cost of watering the streets of a city for the purpose of an assessment upon abutters under R. L. c. 26, §§ 26, 27, it is proper to include the value of water used from the city's waterworks by the department which had charge of the watering, although there never was any charge made as to such water as between the departments.

PETITION filed in the Supreme Judicial Court for the county of Middlesex December 31, 1907, for a writ of certiorari to quash an assessment of the expense of watering streets in Cambridge made under R. L. c. 26, §§ 26, 27.

The petitioners were owners of several parcels of land of different sizes and shapes, situated in different portions of Cambridge, under different conditions of travel, occupation and population and on streets of various widths.

The respondents were the board of aldermen, the board of assessors and the superintendent of streets of Cambridge.

The petition was heard before *Morton*, J., and reserved for the consideration of the full court upon the petition and returns and certificates of the various respondents.

It was agreed that the land of John Reardon Sons Corporation, one of the petitioners, was during the year 1907 vacant, unimproved, partially fenced and unused.

The following appeared to be the facts:

On March 5, 1907, the board of aldermen of Cambridge adopted the following order: "Ordered: That it is hereby estimated and determined that the expense of watering all the public ways within the limits of this city for the present municipal year will be the sum of $40,000: that four-fifths of the expense thereof shall be borne by the abutters: that four cents per linear foot of frontage shall be the rate assessed upon each linear foot of frontage of estates abutting upon such public ways; and that the superintendent of streets is hereby designated as the officer to determine the amount of such assessment upon each estate, and, to make, certify and commit to the board of assessors of taxes of this city, the list required under the provisions of" R. L. c. 26, §§ 26, 27. This order was approved by the mayor on March 7.

On March 26, 1907, the board of aldermen and common coun-

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cil by concurrent action passed the annual appropriation order "towards defraying the expenses of the city . . . for the financial year beginning December 1, 1906, and ending November 30, 1907," in which was the item: "4.8 Street Sprinkling . . . $30,300." This order was approved by the mayor on March 28. An additional appropriation of $1,000 for the same purpose was made on October 15, 1907, "to be met from revenue received from uncollected taxes for the year 1906 and previous years." The latter order was approved by the mayor on October 17.

On April 2, 1907, the board of aldermen adopted in concurrence with the common council, and on April 6 the mayor approved, the following order: "Ordered: That it is hereby determined under the provisions of" R. L. c. 26, §§ 26, 27, "that all public ways within the limits of the city of Cambridge, shall be watered for the present municipal year in part at the expense of the abutters." No such order had been adopted before the order approved on March 7.

Before August 31, 1907, the assessors, having been given copies of the above orders approved on March 7 and April 6, assessed upon the estates abutting upon public ways in said city the proportion of the expense for watering such public ways to be borne by the abutters at four cents per linear foot of frontage upon each linear foot of frontage of the estates abutting upon such public ways. The estates of all of the petitioners were so assessed. The total amount of such assessments was $34,278.58. The total amount assessed upon the estates of the petitioners was $564.67.

On September 16, 1907, the superintendent of streets in a communication to the board of assessors made certificate that "the amount of street watering assessments for the present year as shown by the detailed books in this office is" $34,278.58, and stated the amount to be assessed to each ward.

On August 31, 1907, the assessors committed the tax list with their warrant to the collector of taxes. The amount named therein as "street watering assessment" was $34,278.58.

The petition averred that the superintendent of streets previous to the assessment above described did not "cause to be made any list of such streets as were to be watered, or any list specifying each estate and the number of linear feet thereof abutting

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thereon, and the amount per linear foot, and the amount on each estate of such street watering assessments, and did not certify or commit such lists or any of them to the assessors of taxes previous to the date of the assessment," as called for by R. L. c. 26, § 26.

The certificate of the respondent superintendent of streets stated, as to the above allegation in the petition, that the details of the street watering assessment, contained in his letter to the assessors dated September 16, 1907, including the names of the owners, the locations, areas and street frontages, were previous to the date of that letter "and are now" of record upon the record books of the board of assessors, that he had prepared and placed upon record in his office as superintendent of streets a list of the public streets of said city to be watered in accordance with the aforementioned orders of the board of aldermen dated respectively March 5 and March 12, also specifying upon such records each estate, the number of linear feet thereof abutting thereon, the amount per linear foot and the amount on each estate of each assessment in accordance with said orders of said board of aldermen, but that, previous to the filing of this petition, he had not formally certified and committed said list to the board of assessors, inasmuch as, upon comparison of his records with the records of the said board of assessors, it was found by him that his records as to the name of the owner, the location, area, street frontage and street watering assessment in each case corresponded in every particular with the records of the board of assessors relating thereto; that his records were in the same building one floor below the room in which the records of the board of assessors were kept, and have always been accessible and at all times open to the inspection and comparison of the board of assessors.

The petition also averred that the total expense of watering the streets of the city for the municipal year 1907 amounted to $31,291.09, which was subject to a deduction of "revenue received from collections other than from assessments," amounting to $1,123.95, leaving as the net expense of the street watering $30,167.14; and the petition gave a list of the items making up the total; and it also averred that four fifths of said total expense, which, according to the vote of the board of aldermen

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of March 5, was to be paid by the abutters, amounted to the sum of $24,133.71.

The certificate of the respondent superintendent of streets stated that "the total expense incurred by the city and the value of the water used in watering the public streets was $39,564.61," which was subject to the deduction for "revenue received from collection other than from assessments," stated in the petition, leaving a net expense of $38,440.66; and that the items of the total expense were the same as set forth in the petition, except for the following additional item: "10,341,900 cu. ft. water used in watering streets during the year ending Nov. 30, 1907, @ 8c per 100 cu. ft. — which is substantially the price established for metered water by ordinance, $8273.52." As to this item, he certified: "The watering of all such public ways was done under the general care and charge of and by the street department of said city. No charge was made to the street department by the water works department which furnished the water in watering the streets, and no credit was given to the water works department for the water so used, and the books of record of the city auditor show no payment to, or credit to the water works department for the water so used."

E. M. Parker, for the trustees of the University Associates.

H. J. Coolidge, for the trustees of the Harvard Riverside Associates and others.

F. J. Carney, for George G. Wright and others.

G. A. A. Pevey, for the respondents.

KNOWLTON, C. J. This is a petition for a writ of certiorari to quash an assessment of the expense of watering streets in the city of Cambridge, made under the R. L. c. 26, §§ 26 and 27. The most important question in the case is whether the statute is unconstitutional, because it gives the owner of the property assessed no opportunity to be heard in regard to the assessment. If no such opportunity is secured to him by the statute, it is invalid as an attempt to take his property without due process of law. *Sears* v. *Street Commissioners*, 173 Mass. 350, 355, and cases cited. See also *Norwood* v. *Baker*, 172 U. S. 269; *Adams* v. *Roanoke*, 102 Va. 53, 63. But if the right to a hearing is given upon an appeal, or upon an application for an abatement, it is sufficient. *Sears* v. *Street Commissioners*, *ubi supra*, and cases cited.

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In § 27 this statute specifies particulars in which the assessment is to be like the annual tax upon property, and declares that it "shall be a part of the tax for that year on such estate." Then follows this provision: "But the assessors shall make no abatement thereof except upon the recommendation of the board or officer by whom the list was certified to them." In this it is assumed that, as in the case of other taxes upon property, there is a right to apply to the assessors for an abatement. Their right to grant the abatement is limited by the requirement of a recommendation from the board or officer who certified the list on which the assessment was founded. That the landowner has a right to apply for an abatement, and that the assessors have a right to grant it, upon this recommendation, is as plain as if it were stated expressly, instead of being implied unquestionably. That the board or officer may make such a recommendation is included in the provision, and this also includes a right on the part of the landowner to apply for the recommendation, and to present his reasons for asking for it. We interpret the statute as giving him this right, and including an official duty on the part of the board or officer to hear him and pass upon the merits of his claim and give him the recommendation for an abatement, if it appears that the tax or any part of it was improperly assessed. While the statute is not explicit in stating particulars, it plainly implies all that is necessary. It has been before the court three times, and in two cases it was expressly held to be constitutional, although this question was not raised by counsel nor considered by the court. *Sears* v. *Aldermen of Boston*, 173 Mass. 71. *Ward* v. *Aldermen of Newton*, 181 Mass. 432. *Hodgdon* v. *Haverhill*, 193 Mass. 327. The statute, with an amendment applicable only to the city of Boston, was considered further in *Stark* v. *Boston*, 180 Mass. 293. This amendment provides for a division of the territory of the city into districts, and gives persons aggrieved by a charge for watering streets a right to apply to the board of street commissioners for an abatement. The assessment upon each estate is made by the assessors. As the application for an abatement is to a different board from that which assessed the tax, there is a direction that they shall consider the assessment, and abate it if it is unreasonable, and that the treasurer of the city shall repay the amount abated if it has been col-

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lected. As to the particulars of the application and the hearing, little more is stated than is necessarily included in the implication of the R. L. c. 26, § 27. We are of opinion that the section just cited gives persons assessed the right to be heard before the assessors upon an application for an abatement, and a right also to be heard upon all questions affecting the validity and amount of the assessment, upon an application for a recommendation to the board or officer who certifies the list to the assessors, and that it is the official duty of such board or officer to give a recommendation, if, upon hearing, the assessment seems to be unwarranted or excessive. In this respect the statute meets the requirements of the constitution.

It appears that one of the petitioners is the owner of a parcel of vacant, unimproved land, upon which a tax for watering streets to the amount of $19.84 was assessed. If application had been made to the assessors for an abatement and to the superintendent of streets for a recommendation, the petitioner would have been entitled to have this tax abated. It is contended that the assessment upon all the abutters in the city should be quashed because of this erroneous assessment.

In *Sears* v. *Aldermen of Boston*, 173 Mass. 71, in *Stark* v. *Boston*, 180 Mass. 298, in *White* v. *Gove*, 183 Mass. 333, and in *Cheney* v. *Beverly*, 188 Mass. 81, the subject of the assessment, at a certain rate per front foot, of lands abutting on a street was considered. In these, and in numerous other cases, it is held that special taxation of this kind in substantial excess of the special benefits received is illegal. In the first two of these cases it was assumed that there might be occupied lands, abutting upon streets in remote places within the limits of a city, that would receive no special benefit from watering streets, and upon which a special tax for the cost of it could not legally be assessed. In *White* v. *Gove*, at page 337, we find this language: "If, in any city, it should be determined that the watering of a public way through a forest should be paid for by the abutters, there might be a remedy by certiorari for a decision without foundation in law. The constitutionality of the statute depends upon the fact that a classification is called for, and the provision for an assessment upon the abutters applies only to those places, determined upon by the board of aldermen, where there will be

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special benefits from the watering." In *Stark* v. *Boston*, *ubi supra*, it is said that the statute, although it does not say so in terms, "requires that the assessments shall be founded on special and peculiar benefits, and shall be reasonable and proportional." In *Cheney* v. *Beverly*, 188 Mass. 81, 85, the court says of the R. L. c. 49, § 5: "We are of opinion that the statute should be construed as if it contained the words 'but in no case shall an assessment be made that exceeds the special benefit received by the estate assessed.'" We are of opinion that there is the same implication in the R. L. c. 26, §§ 26, 27.

It follows that, while full effect must be given in all ordinary cases to the legislative determination that an assessment by the front foot, where the conditions are similar, is as nearly proportional and equal as is reasonably practicable, if it appears that an assessment made in that way will impose upon any property a liability substantially in excess of the special benefits conferred, such an assessment cannot lawfully be made. In such exceptional cases, as was held in *Stark* v. *Boston*, *ubi supra*, if an assessment has been made erroneously it should be abated. That remedy will usually be ample to relieve from mistakes made upon streets running through lands occupied with buildings. In that case there was an attempt to recover back an assessment paid under protest. The court said of the remedy by abatement that it "is the only one that can be availed of under the statute. . . . The landowner ought not to be permitted in proceedings for the enforcement of the assessment, or in a suit to get back the money after it has been paid, to show that no special or peculiar benefits were received." The court was not considering whether, if there was an assessment in utter disregard of the purpose and intent of the statute, such as a failure to attempt a distinction between different parts of a city which were very unlike, and a charge upon abutters for watering streets through a long strip of waste land, the proceedings might be quashed on certiorari, according to the intimation in *White* v. *Gove*, *ubi supra*. We treat that question as undecided.

In the present case we have before us no assessments but those of the petitioners. The assessment covered all the streets of the city, but, except what appears in considering the assessments upon the land of the petitioners, we have nothing to show whether the

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proceeding was such a departure from a correct application of the statute as to require us to quash the assessment as illegal. Upon the case as it is stated, we think the petitioners have no remedy but by a petition for an abatement.

There were certain alleged irregularities in making the assessment. We are of opinion that the order approved April 6, 1907, was a sufficient determination that all the public ways in the city were to be watered in part at the expense of the abutters, and that the fact that it was not made until after the order of the board of aldermen bearing date March 5, 1907, does not affect the validity of the proceedings. The expense was to be estimated under the statute, and the rate per front foot was to be determined in reference to the estimate. We are of opinion that the slight inaccuracy in the estimate and in the amount of the assessment, in reference to the amount which was afterwards expended, does not affect the validity of the assessment.

We are of opinion that the value of the water furnished by the city from its aqueduct, maintained at its expense, might be included as a part of the cost of watering the streets.

There was an irregularity in the action of the superintendent of streets in his failure to certify to the assessors, before the assessment, a list of the streets, and of the number of linear feet and the amount of the assessment on each estate, as required by the R. L. c. 26, § 26. But it appears that the assessors had in their office, before assessing the tax, the details for the assessment precisely like those which he should have certified, and they assessed the tax upon them. The failure of the superintendent to perform this duty did not affect the action of the assessors in making the assessment. As a writ of certiorari is not to be issued except when justice demands it, we are of opinion that this error does not require us to quash the proceedings.

Petition dismissed.

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CARLETON HUNNEMAN *vs.* DELIA C. PHELPS.

Norfolk. March 23, 1908. — May 20, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Practice, Civil, Auditor's report, Conduct of trial, Exceptions. *Evidence*, Relevancy and materiality, Opinion: expert. *Witness*, Expert.

In an action of contract which has been referred to an auditor who has filed a report, if one of the parties, without having moved to recommit the report to the auditor, or to have portions of it stricken out, has moved "to discharge the report" on the grounds that the hearings before the auditor were conducted in a manner unfair to him, and that some of the findings of the auditor were prejudicial to him and not germane to the issue referred to the auditor, and the motion has been denied, and if the report is offered in evidence at the trial of the case, it is the duty of the presiding judge to admit it.

An appeal from an order denying a motion of one of the parties to an action of contract "to discharge" a report of an auditor to whom the case had been referred without any agreement that the auditor's findings of fact should be final, will not be sustained, where it does not appear that the judge who heard the motion found that allegations of fact upon which the party making the motion relied were true, but it does appear that the motion was directed solely to the discretion of the court.

An auditor, to whom was referred an action of contract for the value of professional services rendered by the plaintiff, an attorney at law, to his client, the defendant, stated in his report "I find that it must have been evident some time before the termination of the relation of attorney and client . . . that from [the defendant's] . . . inability to speak the truth on any topic, even to her own counsel, it was difficult to be of material assistance to her." At the trial of the case before a jury, the plaintiff having introduced the report in evidence, the defendant called as a witness an attorney at law who had acted as her counsel for a year after the services of the plaintiff were rendered, who testified as to the defendant's general reputation for truth and veracity, but the presiding judge refused to allow him to be asked whether, during his relationship with the defendant as a client, he had found her to be a truthful woman. The defendant's counsel stated that the question was asked to rebut the quoted portion of the auditor's report. *Held*, that the question rightly was excluded, since the counsel referred to by the auditor was the plaintiff, and not any previous or subsequent counsel.

An action of contract was referred to an auditor. The defendant appeared for herself at the hearings before the auditor. At the trial before a jury after the filing of the auditor's report, it appeared that during the hearings before the auditor the plaintiff had moved that a guardian *ad litem* of the defendant be appointed. The plaintiff, in order to rebut a contention of the defendant, which the defendant's counsel stated that he would make in his argument to the jury, that the plaintiff in asking for the guardian had acted in bad faith, offered evidence tending to show that, before the plaintiff asked for the guardian, the auditor of his own accord had interviewed the judge and had laid before him the facts

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upon which the plaintiff had relied in making his motion, and that the judge had suggested that a motion be made for a guardian, and that "any one in the case could make that." The evidence was admitted and the defendant excepted. *Held*, that the evidence was admitted rightly, since it was relevant and material to rebut the contention of the defendant.

On objection by the defendant at a trial to a hypothetical question put by the plaintiff to an expert witness, on the ground that the question assumed facts which were not in the evidence, the presiding judge allowed the question to be put, stating to the jury both at the time it was put and afterward in his charge that, if they did not find the facts to be as they were assumed to be in the question, they should disregard the answer. *Held*, that the defendant had no ground for exception.

CONTRACT to recover the value of professional services as an attorney at law alleged to have been rendered to the defendant by the plaintiff from March, 1904, to January, 1905. Writ in the Superior Court for the county of Norfolk dated January 19, 1905.

The case was referred to an auditor "to hear the parties, to examine their vouchers and evidence and to state the accounts of the parties and to make report thereof to the court." The hearings before the auditor began on March 27, 1907, and were closed July 18, 1907. The only witnesses that appeared before the auditor were the plaintiff and the defendant. After the cross-examination of the plaintiff by the defendant personally, without the aid of counsel, the defendant testified in her own behalf. Before her testimony was completed, the auditor interviewed *Fessenden*, J., whose statement regarding the interview, referred to in the fourth paragraph of the opinion, was as follows: "Before the application for the appointment of a guardian *ad litem* for the defendant . . ., the auditor came to see me and told me he was troubled about the mental condition of Miss Phelps; that she had no counsel; that her conduct before him troubled him as to her mental condition; and that he came as an officer of the court to me and would like suggestions from me as to his duty in the matter. I told him that if she was mentally incompetent no judgment against her would be valid unless a guardian *ad litem* were appointed; that he could make a report to the court concerning the matter or a motion for the appointment of a guardian *ad litem* could be made; that as to the report, I hesitated about that, fearing that it might injure Miss Phelps; that as to the motion for a guardian *ad litem*, any one in the case could make that."

Thereupon, on April 25, 1907, the plaintiff moved for the

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appointment of such guardian, and the motion was granted on June 19, 1907, and thereafter the guardian appeared before the auditor on the defendant's behalf, and the cross-examination of the plaintiff was reopened and was gone into fully by the guardian.

The auditor's report was filed on July 25, 1907, and stated the account to be as set out in the declaration. It also contained the following statements: "On . . . [certain dates] . . ., a great deal of time was spent by the plaintiff in conferring with the defendant in regard to [certain] mortgages, and at this time, as at other times, I find that the defendant forced the plaintiff to spend more time on her affairs than was reasonably necessary for their proper prosecution. But this was done in spite of the fact that the plaintiff explained to the defendant what she was doing and urged her to be more economical of his time. . . . I find that in the course of his employment the plaintiff was called upon to pass upon many difficult questions, and that he was continually hampered by the defendant, and that much of the benefit of his services was lost through her wilful disregard of his advice. The only point in this case I found difficult to decide was the one presented by the attitude and conduct of the defendant. I find that it must have been evident some time before the termination of the relation of attorney and client between the plaintiff and defendant that, from the defendant's violent temper, from her disregard of the rights of others, from her continual suspicion, and from her inability to speak the truth on any topic, even to her own counsel, it was difficult to be of material assistance to her; but, on the other hand, the affairs of the defendant were in such confusion, and she was in such need of competent legal advice that I am convinced that the plaintiff was justified in prolonging the relation with the defendant for the period covered by his declaration."

On October 22, 1907, the defendant moved to discharge the auditor's report for the following reasons: (1) because the defense of the defendant was not fully introduced or heard by the auditor, thereby making it inappropriate to allow the report to be offered by the plaintiff as *prima facie* proof of his case; (2) because so much of her defense to the action as was intro-

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duced by the defendant was given without direction or examination by any counsel representing her; (3) because there was no cross-examination of the plaintiff by counsel for the defendant except that of the guardian *ad litem*, whose authority to so act was expressly repudiated by the defendant in the auditor's presence, and to whom no assistance was given by the defendant for the purpose of cross-examination of the plaintiff by him; (4) because the statements (quoted above) regarding the defendant are strongly prejudicial and defamatory and are unnecessary and add nothing to the substance of the report; (5) because "all the circumstances of the case and its history to the present time are so unusual and extraordinary that the report and the findings therein contained should not be given the weight accorded to auditors' reports under ordinary circumstances." The motion was denied on November 8, 1907.

On November 18, 1907, the defendant moved that the appointment of the guardian *ad litem* be vacated, and the motion was granted the next day by *Schofield*, J., he finding "that there is no present necessity for the services of a guardian *ad litem*, . . . the defendant agreeing to conduct the case in court by counsel of her own selection."

The case was tried before *Schofield*, J. The defendant objected to the admission in evidence of the auditor's report on the following grounds: (1) because the report raises issues that are outside of the scope of the auditor's rule under which the case was submitted; (2) because the report shows that the case was not fully heard by the auditor; (3) because the report is not such a report as the Revised Laws contemplate shall be regarded as *prima facie* evidence of the matters embraced in the order. The report was admitted and the defendant excepted.

To control and rebut that part of the auditor's report that found that the defendant was incapable of telling the truth on any topic, even to her own counsel, J. J. Feely, Esquire, testified for the defendant that in 1905 and 1906 he had acted as counsel for her for a period of "approximately a little over a year." He was permitted also to testify as to the general reputation of the defendant for truth and veracity, but, upon objection by the plaintiff, the defendant was not allowed by the

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presiding judge to ask him whether during his relationship with the defendant as a client he had found her to be a truthful woman, and the defendant excepted.

The plaintiff propounded to witnesses who testified as experts on the value of legal services a hypothetical question to which the defendant objected on the ground that it contained many assumptions which did not appear in the evidence in any way. Upon the plaintiff's counsel stating to the presiding judge that the question was framed on the assumption that there was evidence which would warrant a finding that the facts assumed in the question were true, the presiding judge allowed the question to be put "with the understanding that unless the jury find the assumption of the fact to be sustained by the evidence they may disregard the answer," and at the close of the charge to the jury, the matter being called to the attention of the presiding judge, he repeated that the testimony was admitted subject to that qualification, and that, if the jury should not find that the facts were as they were assumed to be in the questions, then they should disregard the witness's answers.

The portion of the charge which referred to the plaintiff's conduct with regard to a petition for the defendant's removal as executrix of the will of her father was as follows: "In respect to the conversation with Miss Florence L. Phelps, it is proper for the jury to consider the situation at the time as it is shown by the evidence. The effort of the jury should be in passing upon the issues in this case to place before their minds as far as possible the exact situation as it went on from day to day between the plaintiff and the defendant when the services were being rendered. You should try to reproduce those conditions in your mind just as clearly as you can reconstruct them from the evidence which has been introduced." And, at the close of the charge, the presiding judge again stated in emphatic terms that the question of the plaintiff's fidelity was for them to determine. Other facts are stated in the opinion.

There was a verdict for the plaintiff and the defendant alleged exceptions.

M. H. Browne, (*J. M. Browne* with him,) for the defendant.

E. B. Adams, for the plaintiff.

SHELDON, J. The court rightly admitted the auditor's re-

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port in evidence. A motion to discharge the report had been denied by the court; and the defendant never asked to have the report recommitted, and expressly declined to ask that any part of it be stricken out. If there were any such errors in the report as were claimed by the defendant, which does not appear, the defendant's remedy was by moving to recommit the report or to have any erroneous or injurious portion stricken out. R. L. c. 165, § 58. *Briggs* v. *Gilman*, 127 Mass. 530, 531. *Collins* v. *Wickwire*, 162 Mass. 143. *Sullivan* v. *Arcand*, 165 Mass. 364, 367. Under the circumstances appearing at the trial, it was the duty of the court to admit the report in evidence. R. L. c. 165, § 55.

And the previous order of the judge refusing to discharge the auditor's report must be affirmed. It does not appear that the judge found any of the alleged facts stated in the reasons assigned in the defendant's motion to be true. So far as any of them may have existed, they were addressed solely to the discretion of the court. *Craig* v. *French*, 181 Mass. 282. *Tripp* v. *Macomber*, 187 Mass. 109, 110. *Allwright* v. *Skillings*, 188 Mass. 538. *Hart* v. *Brierley*, 192 Mass. 147. There was here no agreement that the auditor's findings of fact should be final, and the rule of *Pettey* v. *Benoit*, 193 Mass. 233, is not applicable.

The exclusion of the question put to Mr. Feely was proper. Even if the defendant's reputation for truth and veracity had been put in issue, this question would not have been competent. *Commonwealth* v. *Kennon*, 130 Mass. 39. The argument that the question should have been admitted to contradict the finding of the auditor as to "her inability to speak the truth on any topic even to her own counsel," rests upon a misconception of the report. The auditor was speaking of the difficulties thrown in the plaintiff's way while acting as counsel for the defendant by reason of her untruthfulness to him, among other causes; and when he mentioned her counsel he manifestly referred to the plaintiff, who at the time spoken of had been the defendant's counsel. Testimony that she had told the truth to Mr. Feely could have of course no bearing upon the question whether she had been unable to tell the truth to her former counsel.

The statement which it was agreed would have been made by Mr. Justice Fessenden was rightly admitted to meet the argu-

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ment against the plaintiff's good faith in asking for the appointment of a guardian *ad litem* which was not only foreshadowed but avowed by counsel for the defendant.

The hypothetical question put to the plaintiff's experts was properly admitted with the restriction put upon it by the judge. *Anderson* v. *Albertstamm*, 176 Mass. 87. *Commonwealth* v. *Tucker*, 189 Mass. 457, 477. If the defendant's counsel desired to stand upon the distinction between the word "may" as used by the judge, and the word "must," he should have called this explicitly to the judge's attention. And for the same reason the defendant's exception to the ruling made in the charge to the jury as to this hypothetical question must be overruled.

We do not find any error in the instructions given to the jury. The duty of the plaintiff to the defendant as his client was clearly and fully stated. Whether it was or was not against the interest of the defendant that her sister should join in the petition for the defendant's removal from her position as the executrix of her father's will does not appear from anything in the bill of exceptions. It may have been for the defendant's advantage to have the objections of all parties considered and decided in one petition. This whole matter was fairly left to the jury.

The exception to the instruction that it must be assumed that the auditor, as an officer of the court acting in a judicial capacity, had acted in a proper manner, has not been argued; and we treat it as waived. We cannot doubt the correctness of the ruling.

It is not necessary to consider separately those exceptions to the charge which are not disposed of by what has been said. The subject matter of all of them was properly left to the jury, with full and explicit instructions. We have carefully considered all the suggestions made by counsel, and find no error in the way that the case was submitted to the jury. The order denying the defendant's motion to discharge the auditor's report must be affirmed, and the exceptions must be overruled.

So ordered.

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GARFIELD AND PROCTOR COAL COMPANY *vs.* PENNSYLVANIA COAL AND COKE COMPANY.

Norfolk. March 24, 1908. — May 20, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Contract, Construction, Performance and breach. *Evidence*, Extrinsic affecting writings, Admitted without objection, Admissions and confessions. *Waiver*. *Practice, Civil*, Rulings and instructions. *Agency*, Authority to make admissions. *Corporations*. *Damages*.

A contract in writing for the sale and delivery of coal began as follows: "We have this day sold you fifty thousand tons bituminous coal to be shipped as follows: twenty five hundred tons per month from September 1, 1902, until April 1, 1903, at price of $2.80 per gross ton . . ., balance of tonnage, about thirty two thousand five hundred tons, to be shipped in about equal proportions between April 1 and September 1, 1903, at the price of $2.60 per gross ton." A subsequent provision was as follows: "Should we fail to ship to you the full tonnage due to you from September 1, 1902, to April 1, 1903, in about equal monthly quotas, we authorize you to go into the open market and buy any balance unshipped, sending us bill for the difference in price, if any." *Held*, that by this agreement the seller was bound to ship at least twenty-five hundred tons of coal in each month from September 1, 1902, to April 1, 1903; that the words "in about equal monthly quotas" as used in the clause providing a mode for the assessment of damages could not control the express stipulation with which the contract opened, the clause being inserted, not for the purpose of defining the obligation of the seller as to shipments, but to provide a ready means of settling the damages in case of a breach of the contract, and that the utmost effect that could be given to the words "in about equal monthly quotas" would be to treat them as giving the seller liberty to ship somewhat more than twenty-five hundred tons in any particular month.

In an action for the alleged breach of a contract in writing for the sale and shipment of a certain amount of coal in each month during a period named, the correspondence and negotiations of the parties before the making of the contract may be competent, under the circumstances of the particular case, as an aid in construing the language in which the parties finally embodied their agreement, by enabling the court to understand the subject matter of the contract as it lay in the minds of the parties and thus to determine the meaning which they put upon any doubtful or ambiguous terms they may have used; but merely tentative offers made by either party while they were endeavoring to reach an agreement cannot control the plain meaning of their contract as finally concluded.

In an action for damages incurred by reason of the alleged failure of the defendant to deliver coal to the plaintiff at the times and in the amounts required by the terms of a contract in writing, under which the defendant was bound to ship to the plaintiff at least twenty-five hundred tons of coal "f. o. b. vessel" at a port named in each month during a period named, where it appeared that there was no storage for coal on the piers from which the coal was shipped, that a vessel arriving for coal anchored in the stream to await her turn to load, that

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when she took her place at the piers the coal was dumped into her from the railroad cars which brought it from the mines, that when the vessel was loaded she left the piers, and the coal, then and not before, was billed by the defendant to the plaintiff, it was *held*, supporting the findings and rulings of an auditor as adopted by the trial judge, that the meaning of the contract was that the defendant should place twenty-five hundred tons of coal each month on vessels to be furnished by the plaintiff, so that the vessel or vessels during the month could sail for their destination with at least twenty-five hundred tons, that it was the duty of the plaintiff to furnish each month vessels capable of carrying the twenty-five hundred tons, and that a failure to do so would excuse the defendant, that, if the plaintiff in any month sent a vessel capable of carrying more than twenty-five hundred tons, the defendant's obligation for that month ceased upon its loading the twenty-five hundred tons into the vessel during the month, and, if the plaintiff saw fit to hold the vessel over for a full cargo, it could not show any breach of the defendant's contract for that month, but that the dates of the respective shipments were the dates when the vessels were loaded and ready to sail and were not the dates when portions of the coal were dumped into a vessel from time to time before she was loaded sufficiently to be ready to sail.

In an action for damages incurred by reason of the alleged failure of the defendant to deliver coal to the plaintiff at the times and in the amounts required by the terms of a contract in writing which contained a clause making the delivery of coal subject to causes beyond the defendant's control, if it appears that the defendant failed to make the deliveries at the times required by the contract but afterwards shipped substantially all the coal stipulated for and that the plaintiff received and paid for it without any reservation or claim for damages on account of delay, and made statements of satisfaction with the conduct of the defendant, this does not constitute, as matter of law, a waiver of the plaintiff's claim for damages for breach of contract if it also appears that the acts and statements of the plaintiff, relied on to show a waiver, were done and made when the plaintiff supposed that the defendant unavoidably had been prevented by a scarcity of coal from making its deliveries more promptly, and when the plaintiff was ignorant of the fact, afterward discovered by it, that during the period in which the defendant failed to make the deliveries of coal to the plaintiff called for by the contract it was making deliveries to other persons, which it was not under obligation to make, of coal more than sufficient in amount to comply with the requirements of the contract.

Where a seller has agreed to deliver goods in specified amounts at certain times, and fails to comply with the terms of his contract as to the times at which the specified amounts shall be delivered, but ultimately delivers all the goods stipulated for by the contract, the buyer by taking what he can get under the contract when he can get it does not necessarily, as matter of law, waive his claim for damages for a failure to make the deliveries at the agreed times and in the agreed quantities.

The proprietor of a coal mine agreed in writing with a coal merchant to ship to him at a price named twenty-five hundred tons of coal in each month from September 1, 1902, until April 1, 1903. The contract contained the following provision: "Should we fail to ship you the full tonnage due you from September 1, 1902, to April 1, 1903, in about equal monthly quotas, we authorize you to go out into the open market and buy any balance unshipped, sending us the bill for the difference in price, if any." *Held*, that the provision quoted was inserted for the benefit of the buyer and gave him a privilege to be exercised at his option, and was not provided as the exclusive means for ascertaining or liquidating

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the buyer's damages in case of a failure of the seller to ship the required amount of coal in each month during the period named, so that, in case of such a breach of the contract by the seller, the buyer did not waive his claim for damages by failing to buy coal to fill the deficiencies and sending bills to the seller for the difference in price.

In an action by a coal dealer against the owner of mines of bituminous coal for the alleged breach of a contract in writing for the sale and shipment of a certain amount of coal in each month during a period named, it appeared that there were printed at the head of the paper on which the contract was written the words "Sales subject to strikes, accident or causes beyond our control." In the body of the contract were the words "in case of strikes at the mines then such portion as should have been shipped during that period is to be cancelled." During the period in which the deliveries were required there was a strike in anthracite coal mines which seriously affected the coal business in regard to bituminous as well as to anthracite coal. The judge ruled that the words "Sales subject to strikes, accident or causes beyond our control" at the head of the paper formed a part of the contract, and added "but the word 'strikes' means strikes at the defendant's mines." The judge refused a request of the defendant to rule that "Upon the evidence at the time of making the contract there was an established custom in the coal trade in Pennsylvania that all sales were subject to strikes, accident, and causes beyond the control of the seller." The judge, however, did rule that "Upon the evidence the delivery of coal by the defendant under its contract was subject to strikes, accident, and causes beyond its control," although he found as a fact that the defendant did not bring itself within the terms of the request. *Held*, that the ruling last quoted and the finding of fact by the judge, made it unnecessary to pass upon the judge's ruling that the word "strikes," in the sentence at the head of the paper meant strikes at the defendant's mines or upon his refusal to make the ruling requested in regard to the existence of the alleged custom, as the defendant could not have been aggrieved by this ruling and refusal to rule whether they were correct or not.

In an action by a coal dealer against the owner of coal mines for the alleged breach of a contract in writing for the sale and shipment of a certain amount of coal in each month during a period named, the contract containing a clause making the deliveries of coal subject to strikes, accident and causes beyond the control of the defendant, the trial judge ruled in substance that the defendant would not be liable for deficiencies on its part which were due to a strike or a shortage of cars or other causes beyond its own control, if under the circumstances it had treated the plaintiff fairly and ratably with reference to the various other parties with whom it was dealing, and that the defendant was not bound under the terms of the agreement to deliver to the plaintiff the whole amount of its order to the exclusion of other customers entitled to receive coal under contracts with the defendant. The judge added the following: "But when the defendant was in default to the plaintiff, or when it became reasonably apparent to the defendant that it could not supply the coal called for under its contract with the plaintiff, it could not then enter into new obligations and rely upon deliveries of coal in fulfilment of such obligations to support its defense that its default to the plaintiff arose from causes beyond its control." *Held*, that the general ruling was correct, and that the additional ruling also was correct.

Where at a trial relevant evidence has been admitted without objection it has become a part of the case even if it might have been excluded upon objection.

If the president of a corporation, who is its chief executive officer, makes a state-

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ment in a letter, written by him in his official capacity in conducting the business of the corporation, upon a matter which naturally would be within his personal knowledge, his statement is admissible in evidence in an action against the corporation in which the statement is relevant as an admission of the defendant.

In an action for the alleged breach of a contract in writing for the sale and shipment at a port named of a certain amount of coal in each month during a specified period, where it is admitted by the defendant that the plaintiff was bound to have vessels at certain piers at the times when the defendant ought to have delivered the coal, if it appears that the defendant did not supply coal for these vessels to the extent and at the times required by the contract, the plaintiff is entitled to recover as an element of his damages any payments for demurrage, incurred by him under reasonable contracts with the owners of vessels, which are found to have been a direct and natural consequence of the defendant's failure to furnish the coal on time.

CONTRACT for damages incurred by reason of the alleged failure of the defendant to deliver coal to the plaintiff at the times and in the amounts required by the terms of a contract in writing between the plaintiff and the defendant dated August 18, 1902. Writ dated November 8, 1904.

In the Superior Court the case was tried before *Schofield*, J., without a jury. The case had been referred to James D. Colt, Esquire, as auditor. At the trial the plaintiff put in evidence the report of the auditor, and rested. The defendant then introduced depositions and documents used in evidence before the auditor and some further testimony not put in before the auditor. The plaintiff in rebuttal put in evidence other depositions and documents used before the auditor, and there also was put in evidence by each party a large amount of correspondence between the parties used before the auditor.

The contentions of the parties were stated at the beginning of the auditor's report as follows:

"The case is an outgrowth of the anthracite coal strike of 1902, which began on April 10 and ended on November 26 of that year, and which seriously deranged the coal business of north-eastern United States, both as regards anthracite and bituminous coal.

"The plaintiff is a corporation engaged in the business of buying and selling coal in Boston and vicinity, and the defendant is a corporation, owning coal mines and doing business in Philadelphia, Pennsylvania. The defendant is a coal producer. Its coal is wholly of the bituminous variety, and its mines are

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located in Pennsylvania on one of the branch lines of the Pennsylvania Railroad."

"The plaintiff, in its declaration, alleges that on or about August 12, 1902, a contract for coal was entered into in the shape of an offer and an acceptance which were as follows:

"'Pennsylvania Coal & Coke Co.
Arcade Building.

"'J. L. Mitchell, President. Sales subject to strikes, accident
Bituminous coal. or causes beyond our control.
Furnace and foundry coal. Railroad weights govern all sales.

"'Philadelphia, August 13, 1902.

"'Garfield & Proctor Coal Company,
Boston, Mass.

"'Dear Sirs, — Confirming our verbal agreement with your Mr. Spring, we have this day sold you 50,000 tons bituminous coal to be shipped as follows: 2,500 tons per month from September 1, 1902, until April 1, 1903, at price of $2.80 per gross ton f. o. b. vessel at South Amboy, balance of tonnage, about 32,500 tons, to be shipped in about equal monthly proportions between April 1 and September 1, 1903, at the price of $2.60 per gross ton f. o. b. vessel at South Amboy.

"'It is understood, should you desire to load any portion of this tonnage at Philadelphia, instead of South Amboy, we will furnish it at the same basis of price, you to give us proper notice at any time you want destination of shipments changed.

"'It is also understood that at any time we have coal to spare for all-rail shipments, in excess of the present contract between yourselves and Mr. Mitchell for 20,000 tons to Mechanicville, we will make shipment to that point if so instructed by you, and apply this tonnage on the present contract of 50,000 tons at price of $1.40 per gross ton f. o. b. mines.

"'Should we fail to ship you the full tonnage due you from September 1, 1902, to April 1, 1903, in about equal monthly quotas, we authorize you to go out into the open market and buy any balance unshipped, sending us bill for the difference in price, if any, with this proviso, however, that in case of strikes at the mines then such portion as should have been shipped during that period is to be cancelled. The above figures are based

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on the present rates of freight. Should there be any change in freight rates after April 1, 1903, a corresponding change to be made in these prices.

"'Payments cash thirty (30) days from date of Bill Lading.

"'Yours truly,

"'Pennsylvania Coal and Coke Co.

J. L. Mitchell, President.'"

"'We hereby confirm and accept the above contract and all conditions as set forth. In case we should fail to take the required monthly tonnage we authorize you to sell the same in the open market, if you so desire, and send bill to us if any loss is sustained on any tonnage so disposed of.

"'Garfield & Proctor Coal Co.

W. W. Spring, V.-P.'"

"That the defendant delivered only a portion of the fifty thousand tons called for by the contract and refused and neglected to deliver the balance of the coal; that a large part of the portion delivered was delivered only after great and unreasonable delay, and that the defendant refused to load certain vessels and greatly delayed the loading of others, chartered and sent by the plaintiff to carry the coal, thereby obliging the plaintiff to pay large sums of money as demurrage to the owners of such vessels."

"Upon request the plaintiff filed specifications as follows:

"First. Approximately the number of tons that the defendant failed to deliver under the contract set forth in the declaration is three hundred and twenty-eight tons.

"Second. Instead of shipping fifty thousand tons of coal to the plaintiff as follows: — namely, twenty-five hundred tons of coal per month from September first, 1902, to April first, 1903, and thirty-two thousand five hundred tons in about equal monthly proportions between April first, 1903, and September first, 1903, as provided in said contract, — the defendant shipped in each of the months specified in the following table the amount of coal set against each month, and no more, from which the great and unreasonable delay of the defendant in performing the contract appears:

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1902	
September	596.4
October	1,566.4
November	3,255.
December	No coal furnished
1903	
January	1,345
February	2,828
March	4,031
April	6,661
May	4,540
June	8,184
July	7,909
August	8,757
	49,672.8

"Third. A memorandum of the demurrage paid on account of delayed shipments by the Pennsylvania Coal & Coke Company under the contract set forth in the plaintiff's declaration is as follows:

Dates of Bills of Lading.	Name of Vessel.	Amount paid for Demurrage.
January 1, 1903	J. F. Potter	$2,143.75
February 9	Marie Palmer	494.90

"The defendant filed an answer in which it alleges that the contract expressly provided that sales were subject to strikes, accidents, or causes beyond its control; that during the period covered by the contract it made every effort to furnish coal to the plaintiff as called for by the contract; that prior to the termination of the period covered by the contract it delivered 49,672.8 tons of coal to the plaintiff, leaving only 327.2 tons to be delivered, which 327.2 tons the plaintiff declined to receive; that the plaintiff waived its right to have the coal delivered at the times and in the quantities set forth in the contract; and that, in so far as the coal was not delivered as provided by the contract, the defendant was prevented from making deliveries by reason of strikes, loss of coal *en route*, delays in transporta-

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tion, scarcity of cars and other accidents, and causes beyond its control.

"The defendant in opening contended that, taking the whole contract together and the circumstances surrounding it, it called for a fair monthly average delivery of twenty-five hundred tons; that, as soon as coal was loaded on a vessel at Greenwich Piers in Philadelphia, such loading constituted a delivery of coal to the plaintiff; and that the evidence would show a waiver on the part of the plaintiff of any provision of the contract which called for the delivery of twenty-five hundred tons a month from September 1, 1902, to April 1, 1903. The defendant also contended that it was relieved from the obligations of its contract, which provided that sales were subject to strikes, accident, and causes beyond the defendant's control, in that, owing to the anthracite strike, there was an extraordinary demand for bituminous coal and a consequent shortage of coal cars with which to carry its coal to the delivery point; that the car shortage continued until the spring of 1903; that the Pennsylvania Railroad, the only road to its mines, would not or could not furnish cars; that said railroad, for its own necessities, confiscated some of the defendant's coal in transit; and that the defendant's delivery of coal under the contract was prevented and hindered by these causes, which causes were beyond its control.

"The defendant also contended that upon its failure to deliver the coal as agreed the plaintiff should have gone out into the open market, in the manner provided in the contract, and purchased coal enough to make up the deficiency in shipments, sending a bill for the same to the defendant, and that, not having done so, it cannot now recover. It was also contended that the charter parties made by the plaintiff for the two vessels on which it had to pay demurrage were unreasonable in their provisions, and that consequently the defendant is not liable to reimburse the plaintiff for this demurrage.

"The price of coal at Philadelphia was thirty cents a gross ton less than at South Amboy, the difference being wholly due to the difference in freight charges. All the coal shipped under the contract was shipped from Philadelphia.

"The amount of coal shipped and invoiced by the defendant to the plaintiff, the amount of shortage claimed by the plaintiff,

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and the amount loaded on board vessels of the plaintiff at Greenwich Piers, is shown by the following table:

1902	Shipped.	Shortage.	Loaded on Vessels.
September	596.4	1,903.6	596.4
October	1,566.4	933.6	2,703.4
November	3,255	0	2,118
December	0	2,500	0
January	1,345	1,155	2,160
	6,762.8	6,492.2	7,597.8

"There was no shortage subsequent to January, 1903. After that month the defendant began shipping coal in large quantities, 2,828 tons in February, 4,031 tons in March, and so on up to and including August, when the total amount shipped equalled 49,672.8 tons, or 327.2 tons less than the 50,000 tons called for by the contract. As to this 327.2 tons, no question is raised and no claim is made.

"Beginning early in September, shortly after the contract was signed, the market price of coal, such as was called for by the contract, began to rise. It rose as high as eight dollars a ton, and the price remained high until the early spring of 1903, when it fell back to about normal.

"The plaintiff contends that it is entitled to recover of the defendant as damages the difference between the market price and the contract price of so much of the coal as was not shipped on time, the market price to be taken as of the time when the coal should have been shipped. It also claims compensation by way of special damages for the amount of demurrage it was obliged to pay the owners of two vessels which it had chartered to load with the coal at Philadelphia in December and January, and which, by reason of the defendant's delay in furnishing the coal, were kept waiting at Philadelphia beyond the lay days specified in the charter parties, thereby obliging the plaintiff to pay demurrage."

The facts found by the auditor so far as necessary to an understanding of the points of law are stated or described in the opinion.

The defendant asked for the following twenty-two rulings,

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which were disposed of by the judge in the manner stated after each:

"1. Under the contract and upon the evidence the defendants were only bound to deliver to the plaintiff from September 1, 1902, to April 1, 1903, a fair monthly average of two thousand to three thousand tons of coal." Refused.

"2. What constitutes a fair monthly average is a question of fact." Refused.

"3. The contract is not to be construed as comprising separate independent contracts on the part of the defendant to deliver to the plaintiff twenty-five hundred tons of coal in each month from September 1, 1902, to April 1, 1903." Granted. "The contract is one contract of sale, with stipulations for delivery in separate instalments."

"4. Coal is shipped within the meaning of the contract when the monthly amount called for by the contract is delivered free on board vessel or vessels at Philadelphia.

"5. Coal is shipped within the meaning of the contract when the monthly amount called for by the contract is delivered free on board vessel or vessels at Philadelphia, without regard to whether it completes the loading of such vessel or vessels." This and the preceding request refused, "but the defendant was not bound to load more than twenty-five hundred tons per month upon any vessel or vessels which the plaintiff might furnish."

"6. Upon all the evidence the plaintiff waived its right to require the shipment of coal in the amounts and at the times called for by the contract." Refused.

"7. The acceptance by the plaintiff of the full amount of coal under the contract and payment in full for the same without objection on the ground of delay constitutes a waiver of claim for damages for failure to deliver in the amounts and at the times called for by the contract." Refused.

"8. The words 'Sales subject to strikes, accident or causes beyond our control,' at the head of the contract, form a part of the contract." Granted, "but the word 'strikes' means strikes at the defendant's mines."

"9. Upon the evidence at the time of making the contract there was an established custom in the coal trade in Pennsyl-

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vania that all sales were subject to strikes, accident, and causes beyond the control of the seller." Refused.

"10. Upon the evidence the delivery of coal by the defendant under its contract was subject to strikes, accident, and causes beyond its control." Granted, "but under the facts found the defendant does not bring itself within the terms of request."

"11. Upon the evidence the defendant was prevented from delivering coal in the manner and at the times called for by the contract, by reason of a general strike prevailing in Pennsylvania." Refused.

"12. Upon the evidence the defendant was prevented from delivering coal in the manner and at the times called for by the contract by reason of causes beyond its control, namely, car shortage and delays in transportation and confiscation of coal by the railroad." Refused.

"13. Failure of the plaintiff to buy coal to fill deficiencies and to notify the defendant and to send bills for the difference in price or to make any demand for such difference constitute a waiver of claim for damages." Refused.

"14. Upon all the evidence the defendant was under obligation to carry out the contracts entered into by J. L. Mitchell prior to the transfer of his collieries by him to the defendant." Refused.

"15. The defendant was not bound to deliver to the plaintiff the whole amount of its order to the exclusion of the defendant's other customers. The defendant was only bound to deliver to the plaintiff such proportion of defendant's reduced means of supply as the amount of the plaintiff's order bore to the whole amount of the defendant's sales, including the ordinary amount of its home trade." Granted, "with the addition after the word 'customers' of the following clause, viz.: 'entitled to receive coal under contracts with the defendant'; and adding at the end the following, viz.: 'But when the defendant was in default to the plaintiff, or when it became reasonably apparent to the defendant that it could not supply the coal called for under its contract with the plaintiff, it could not then enter into new obligations and rely upon deliveries of coal in fulfilment of such obligations to support its defense that its default to the plaintiff arose from causes beyond its control.'"

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"16. The defendant was only bound to distribute such coal as it was able to deliver ratably among its orders on hand at the time of the shortage of cars." Refused.

"17. If the defendant supplied coal on orders given subsequently to the plaintiff's contract, this fact is immaterial if the amount so supplied would not have increased the plaintiff's fair proportion, had such coal been distributed ratably upon all contracts." Granted.

"18. Upon the evidence the contract in suit is a contract for the sale of product of defendant's mines." Refused.

"19. Upon the evidence the defendant, if prevented by reason of car shortage from supplying plaintiff with coal in the amounts and at the times called for by the contract, was under no obligation to purchase coal to supply the deficiency." Refused. "The defendant was bound to make reasonable efforts to obtain and deliver from any available source the quantity of coal which it had contracted to sell to the plaintiff."

"20. The plaintiff is not entitled to recover demurrage incurred by the schooners 'Jennie French Potter' and 'Marie Palmer.' Such damage is too remote." Refused.

"21. Upon the evidence the plaintiff was bound to have vessels at Greenwich Piers when the defendant was bound to deliver the coal, and, as the defendant had the whole of each month in which to deliver it, the lay days should not expire till the end of a month. The lay days of the 'Jennie French Potter' expired December 24 at 8 A. M. The plaintiff cannot recover demurrage for the period from December 24 to December 31, inclusive." Granted.

"22. Upon all the evidence the defendant is entitled to a verdict." Refused.

The judge also made the following findings and rulings:

"1. After examining all the evidence and considering the arguments of counsel, the court in this case has reached substantially the same conclusions as the auditor, except as to one item of damages, explained below. The report of the auditor is confirmed and adopted by the court with the exception above stated, but it may be useful to refer specifically to a few of the important questions in controversy.

"First, in regard to the words 'in about equal monthly

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quotas,' which were inserted by the plaintiff in the proposition submitted by the defendant to it, the court takes this view, viz.: Those words were intended primarily to limit the broad language used by the defendant in the last paragraph; namely, 'Should we fail to ship you the full tonnage due you from September 1, 1902, to April 1, 1903,' under which the defendant might assert the right to ship the coal between September and April in such instalments and at such times as it saw fit. Reading the various provisions of the contract together, including the words inserted by the plaintiff, it seems to the court to be a fair construction to say that the defendant was bound to ship the coal in about equal monthly instalments, with the quantity of twenty-five hundred tons fixed as a minimum limit which the defendant must ship in each month between September and April. The words '2,500 tons per month' cannot be rejected arbitrarily, and by treating them as fixing a limit which the defendant must reach effect is given to those words as well as to the words 'in about equal monthly quotas.' If the defendant failed to ship as much as twenty-five hundred tons in any month between September and April, it was in default, and had the burden of showing legal excuse for the default. Correspondence between the parties prior to the making of the contract was admitted in evidence against the objection of the plaintiff as an aid to construction, and the court holds it was competent. See *Smith* v. *Vose & Sons Piano Co.* 194 Mass. 193; *United States* v. *Bethlehem Steel Co.* 205 U. S. 105; Thayer, Prelim. Treatise on Evidence, 483, at end.

"2. At the trial the defendant introduced evidence which had not been submitted to the auditor upon the question whether the defendant was under a legal obligation to perform the contracts of Mr. J. L. Mitchell made prior to July 30, 1902. Some of this evidence was admitted against the objection and exception of the plaintiff. From the evidence in favor of the defendant an inference might well be drawn that the defendant corporation legally undertook to perform the contracts of J. L. Mitchell as his successor in business, but that inference is repelled by the letter of Mr. W. A. Lathrop, president of the defendant corporation, introduced in evidence as Exhibit 188, and transcribed in the auditor's report. The court gives great weight to that

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letter upon this issue of fact. It is the statement of a man of business written in his official capacity as president of one of the contracting parties to the other contracting party in a commercial contract where the fundamental rule is *bona fides*, and in regard to facts upon which the best sources of knowledge were open to the writer. Upon all the evidence the court finds as a fact that the defendant is not shown to have been under a legal obligation to perform the J. L. Mitchell contracts made prior to July 30, 1902.

"3. In regard to damages for non-shipment in accordance with the contract the court rules that ordinarily the measure of damage would be the difference between the contract price and the market price at the end of each month, but the fundamental principle of damages for breach of contract is compensation. The plaintiff is to be made whole for the loss it has sustained by the breach. The amount expended by the plaintiff in obtaining coal to supply the shortage caused by non-shipment measures one element of damage exactly, provided the amount was reasonably expended. The court finds as a fact that the amount was reasonably expended, and adopts and confirms the finding of the auditor upon this point, $18,244.30.

"In regard to the item of demurrage the court finds that the defendant might reasonably be expected to have foreseen at the time the contract was made that the plaintiff might have demurrage charges to pay if a vessel was unduly delayed in loading. Such charges would be a natural and proximate result of the delay. In order to enable the plaintiff to recover as damages sums paid on account of demurrage, it must prove that the liability for demurrage was due to the default of the defendant. In regard to the 'Marie Palmer' this fact was proved and the entire charge of $494.90 is allowed. In regard to the 'Jennie French Potter' the defendant has made a point which seems to the court to be sound. The total charge for demurrage on this vessel is $2,143.75, being at the rate of $150 per day for fourteen days and seven hours, extending from 8 A. M. on December 24, 1902, to 8 P. M. on January 7, 1903. Exhibit 224 W. The lay days agreed upon in the charter party expired at 8 A. M. on December 24. The defendant was not then in default. Under its contract it was entitled to the remaining days in December

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in which to load, and it has not waived its right. The charge on account of this vessel is reduced to $943.75, and allowed as damages for that amount.

"4. Upon the whole case the court finds for the plaintiff and assesses damages in the sum of $23,605.87, made up as follows, viz.: principal sum, $19,682.95, with interest computed on $1,438.65 (the amount allowed to reimburse demurrage charges), from February 26, 1903, to the date of this finding, and on the balance of $18,244.30 from the date of the writ, November 8, 1904, to the date of this finding."

The defendant alleged exceptions.

B. L. M. Tower, (*E. O. Hiler* with him,) for the defendant.

H. Wheeler, for the plaintiff.

SHELDON, J. We are of opinion that the contract in suit called for a shipment of twenty-five hundred tons of coal per month from September 1, 1902, to April 1, 1903. The express language of the defendant's agreement was that the shipments of coal were to be "2500 tons per month" during that time, at a price of $2.80 per ton; and this is followed by the stipulation that the remainder of the coal should be shipped "in about equal monthly proportions" during the remainder of the period stated, at a lower price. The contract made a clear distinction between the absolute engagement for the shipment of a fixed quantity during the first months of the time provided for and the qualified stipulation for subsequent shipments "in about equal monthly proportions," although each part of the undertaking was made subject to strikes, etc. The subsequent stipulation providing a mode for the assessment of damages if shipments were not made in "about equal monthly quotas," cannot control the express stipulation with which the contract opens. This latter clause was inserted, not for the purpose of defining the obligation assumed by the defendant, but to provide a ready means of settling the damages and making a resort to litigation unnecessary if the defendants should fail to ship in about equal monthly quotas the amount stipulated for during the first period. The utmost effect that can be given to the words "in about equal monthly quotas" in this clause is to treat them as giving to the defendant liberty to ship somewhat more than twenty-five hundred tons in any particular month. This was the construction

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of the contract adopted by the learned judge of the Superior Court before whom the case was tried; and it was correct. The defendant was in default for a failure to ship the stipulated amount of twenty-five hundred tons during any one of these months, and would be liable therefor in damages unless there was some legal excuse for such default.

The correspondence and negotiations between the parties before the making of the contract were indeed competent under the circumstances of the case as an aid in construing the language in which they finally embodied their contract. *Smith* v. *Vose & Sons Piano Co.* 194 Mass. 193. *United States* v. *Bethlehem Steel Co.* 205 U. S. 105. But it remains true, as was stated in both of these cases, that this evidence is received, not to frame a new contract between the parties, but to enable the court to understand the subject matter of the agreement as it lay in their minds, and to determine the meaning which they themselves put upon any doubtful or ambiguous terms which may have been used, and so to apply their language correctly to the subject matter which was in their contemplation. Merely tentative offers made by either party while they were endeavoring to reach an agreement cannot control the plain meaning of the contract which they finally concluded.

Accordingly the defendant's first and second requests for rulings were rightly refused.

The judge refused to give the defendant's fourth and fifth requests, but did rule that the defendant was not bound to load more than twenty-five hundred tons per month upon any vessel or vessels which the plaintiffs might furnish. The coal was all actually shipped at Greenwich Piers in Philadelphia, in accordance with the option given in the contract. The facts found by the auditor and the rulings made by him, which were substantially adopted by the judge, were as follows: "Was the date when the coal was put on the vessel at Greenwich Piers the date of shipment? Greenwich Piers is a shipping point for coal, and is located on the Delaware River in Philadelphia. There is no storage for coal on the piers, and the method of loading vessels is briefly as follows: A vessel arriving for coal anchors in the stream to await her turn to load. As soon as opportunity offers, she takes her place at the piers and the coal is dumped into her

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from the railroad cars which have brought it from the mines. When the vessel is loaded, the coal is billed to the consignee, and the vessel leaves the piers. This method was followed by the defendant in the present case. The plaintiff was bound to furnish vessels for the coal which the defendant had contracted to ship, and, when coal was dumped by the defendant into the plaintiff's vessel, a delivery of coal was made. I am not, however, able to find, in accordance with the defendant's claim, that the date of dumping the coal was the date of shipment. If this were so, then the dumping of a hundred tons of coal in October into a twenty-five hundred ton vessel which was not loaded until some time in November would constitute an October shipment of coal. The intention and clear meaning of the contract was that the defendant should place twenty-five hundred tons of coal each month on vessels to be furnished by the plaintiff, so that the vessel or vessels could, during the month, sail for their destination with at least twenty-five hundred tons. It was the plaintiff's duty to furnish each month vessels capable of carrying the twenty-five hundred tons, and failure to do so would excuse the defendant. On the other hand, if the plaintiff, in any one month, sent a vessel capable of carrying more than twenty-five hundred tons, the defendant's obligation for that month ceased upon its loading twenty-five hundred tons into such vessel during the month. If the plaintiff saw fit to hold the vesssel over for a full cargo, it could not afterwards claim as to that month that the defendant had failed to live up to its obligations. The defendant billed no coal to the plaintiff until the vessels were loaded and ready to sail. I find, in accordance with what was evidently the understanding of both parties, that the date when the vessels were loaded and ready to sail was the date of the shipment."

Undoubtedly the defendant is right in its contention that the general rule is that goods are shipped when they are put on board of the vessel or vehicle in which they are to be carried, and that an agreement to deliver goods previously unascertained free on board of a vessel or other vehicle of transportation is satisfied and the title passes to the purchaser and the goods are at his risk when the proper goods are actually loaded on board for shipment. The cases cited by the defendant's counsel fully support this general doctrine. *Bowes* v. *Shand*, 2 App. Cas. 455. *Ex parte*

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Rosevear China Clay Co. 11 Ch. D. 560, 569. *Brown* v. *Hare*, 4 H. & N. 822, 829. *Mora y Ledon* v. *Havemeyer*, 121 N. Y. 179. *Congdon* v. *Kendall*, 53 Neb. 282. *Clark* v. *Lindsay*, 19 Mont. 1. But in these decisions the courts were dealing with cases in which all the goods that then were to be shipped had been delivered on board of the cars or vessels, and the seller had done all that he could do to secure the dispatch of all the goods that he was bound then to deliver. A very different state of affairs would have been presented if in *Mora y Ledon* v. *Havemeyer*, *ubi supra*, for example, the plaintiffs had seasonably put on board of the vessel only a portion of the quantity of sugar which they had agreed to deliver within thirty days; and a like statement may be made of the other cases above cited. Here, it was the duty of the plaintiff to furnish vessels of sufficient capacity to carry the coal which the defendant was to ship, and the defendant was under obligation to ship upon such vessels the stipulated amount of coal. No vessel could depart until it had on board a sufficient amount of coal, and it was the defendant's duty to furnish such amount for each vessel, subject to the limitation that it was not bound to ship more than twenty-five hundred tons in any one month. Upon the facts found, there was no error in the rulings made upon this subject.

Nor was the judge bound to rule that the plaintiff as matter of law had waived either its right to require the shipment of coal in the amounts and at the times called for by the contract, or its right to claim damages for the defendant's failure to make such shipments. The testimony of Spring, the plaintiff's vice president and buyer, and the fact that the defendant had finally shipped substantially all the coal stipulated for, and Mitchell's testimony that the plaintiff had received and paid for all this coal without any reservation or claim for damages on account of delay, undoubtedly furnished some evidence to sustain this contention of the defendant. *Blodgett* v. *Foster*, 120 Mich. 392. *National Contracting Co.* v. *Vulcanite Portland Cement Co.* 192 Mass. 247. *Merrimack Manuf. Co.* v. *Quintard*, 107 Mass. 127. But there was evidence that the plaintiff's statements of satisfaction with the conduct of the defendant, and its acts bearing in the same direction, were made and performed in ignorance of what was afterwards discovered to have been unfair treatment

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of the plaintiff by the defendant and an unjustifiable failure of the defendant to make shipments which it was fairly able to make and ought to have made; and it is elementary law that no binding waiver of one's rights can be made in such a case as this by one who is ignorant of the facts upon which those rights depend and out of which they grow. Such a waiver to be effectual must be made intentionally and with full knowledge of the material facts. *George N. Pierce Co.* v. *Beers*, 190 Mass. 199. *Metropolitan Coal Co.* v. *Boutell Transportation & Towing Co.* 185 Mass. 391. *Bennecke* v. *Insurance Co.* 105 U. S. 355, 359. *Pence* v. *Langdon*, 99 U. S. 578, 581. *Boynton* v. *Braley*, 54 Vt. 92. Nor did the plaintiff, by taking what it could get under its contract when it could get it, necessarily and as matter of law waive its claim for damages for a failure to make shipments at the agreed times and in the agreed quantities. *Garfield & Proctor Coal Co.* v. *Fitchburg Railroad*, 166 Mass. 119. *Dignan* v. *Spurr*, 8 Wash. 309. *Whalon* v. *Aldrich*, 8 Minn. 346. *Belcher* v. *Sellards*, 43 S. W. Rep. 676. *Clydebank Engineering Co.* v. *Yzquierdo*, [1905] A. C. 6.

Nor did the plaintiff's failure to buy coal to fill the deficiencies in the defendant's shipments and to send bills to the defendant for the difference in price, or to make any demand for such difference, constitute a waiver of its claim for damages. The clause in the agreement allowing the plaintiff to do this was inserted for its benefit, and gave to the plaintiff a privilege to be exercised or not at its option. It was not provided as the exclusive means for ascertaining or liquidating the plaintiff's damages. The case is like *Fisher* v. *Barrett*, 4 Cush. 381. A similar clause in a contract for the delivery of lumber was construed in the same way in *Williston* v. *Mathews*, 55 Minn. 422.

The defendant's sixth, seventh and thirteenth requests were rightly refused.

The eighth request was given with the qualification that the word "strikes" meant strikes at the defendant's mines. The defendant contends that this was incorrect, on the authority of *Davis* v. *Columbia Coal Mining Co.* 170 Mass. 391. In view of the proviso near the end of the contract, where "strikes at the mines" are spoken of, it may be doubted whether the rule of *Davis* v. *Columbia Coal Mining Co.* should be applied here.

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But we need not pass upon this question. As its tenth request was given, the defendant was not aggrieved by this modification of its eighth request. The finding made as to the facts involved in its tenth request would have been equally fatal to the defendant if its eighth request had been given in terms. And for the same reason the defendant was not aggrieved by the refusal to give its ninth request.

The questions raised by the refusal to give the defendant's eleventh, twelfth and fourteenth requests may be considered together. The judge ruled in substance that the defendant would not be liable for deficiencies on its part which were due to a strike or a shortage of cars or other causes beyond its own control, if under the circumstances it had treated the plaintiff fairly and ratably with reference to the various other parties with whom it was dealing; that the defendant was not bound under the terms of the agreement to deliver to the plaintiff the whole amount of its order to the exclusion of other customers. This was correct. *Oakman* v. *Boyce*, 100 Mass. 477. *Jessup & Moore Paper Co.* v. *Piper*, 133 Fed. Rep. 108. *Luhrig Coal Co.* v. *Jones & Adams Co.* 141 Fed. Rep. 617. *McKeefrey* v. *Connellsville Coke & Iron Co.* 56 Fed. Rep. 212. But the judge found that the defendant, under the rule of law adopted, might have made all the shipments to the plaintiff when and as it had agreed to make them; and the defendant contends that this finding was not warranted by the evidence. Whether this was so or not might have been found to depend upon the question whether the defendant had assumed and become bound by certain numerous contracts for the sale and delivery of large quantities of coal which had been made by one Mitchell before the incorporation of the defendant. The defendant afterwards became the owner of Mitchell's mines and succeeded to his business. The defendant had, in each month after July 30, 1902, when it was organized and began making contracts for the sale and delivery of coal, more than enough coal available to satisfy the requirements of all of its own contracts; but it undertook also to carry out the contracts which before July 30, 1902, had been made by Mitchell; and the defendant's failure to comply with its own contracts, including that with the plaintiff, was due, partly at least, to the fact that it made so large deliveries

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under the Mitchell contracts as to leave it unable to fulfil its own obligations. The auditor found that the defendant had not assumed and become bound by the Mitchell contracts. He also found that in every month in which there was a shortage on the plaintiff's contract the defendant shipped on one or more subsequently made contracts more coal than such subsequent contracts called for. And the auditor found and reported that the defendant was not prevented from making the shipments called for by the plaintiff's contract by reason of car shortage or other condition of the coal trade beyond its control, and ruled also that the conduct of the defendant in delivering coal on its own contracts made after and when in default on the plaintiff's contract, deprived it of the defense which otherwise might have been open to it that it was prevented from making shipments by causes beyond its own control.

In spite of the very able argument of the defendant's counsel, we find no error in this. The judge was not bound as matter of law to find upon the new evidence that the company had assumed and become bound by the Mitchell contracts. Whatever the new evidence might have been, the auditor's report was *prima facie* evidence in favor of the conclusion reached by the judge at the trial. The defendant's argument that the letter in which Lathrop, the defendant's president, asserted that the defendant had not assumed the Mitchell contracts, ought not to have been considered upon this question, if it were otherwise valid, would be answered by the fact that it was offered in evidence and admitted without objection. *Demelman* v. *Brazier*, 193 Mass. 588, 592. But the argument is not valid. This was a statement made by the defendant's president, its chief executive officer, in his official capacity, in the conduct of its business, upon a matter which naturally would be within his personal knowledge. The decisions relied upon by the defendant, like *Boston Hat Manuf. Co.* v. *Messinger*, 2 Pick. 223, and *Robinson* v. *Fitchburg & Worcester Railroad*, 7 Gray, 92, are not applicable. The judge's findings upon these questions of fact are conclusive.

Nor is there anything in *Oakman* v. *Boyce*, 100 Mass. 477, and *McKeefrey* v. *Connellsville Coke & Iron Co.* 56 Fed. Rep. 212, before referred to, to justify the contention of the defend-

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ant that it could excuse, even proportionally, its failure to keep its contract with the plaintiff when it was able to do so without discriminating against those entitled under its other contracts, by making new contracts with others, after the exigency upon which it now relies had arisen. The defendant's fifteenth request was rightly modified, and its sixteenth and eighteenth requests were rightly refused. The exception to the refusal to give the nineteenth request has not been argued, and we treat it as waived. It should not have been given in any event. *Summers* v. *Hibbard*, 153 Ill. 102, 110. Nor was the defendant aggrieved by its refusal, in view of the finding that it had coal enough to fill all its own contracts.

As the twenty-first request was given, the only remaining question is whether the damages for demurrage sustained by two schooners should have been refused as being too remote. It must be remembered that the plaintiff was bound to have vessels at Greenwich Piers when the defendant ought to have delivered the coal; and the judge so ruled at the defendant's request. If the defendant did not supply coal for these vessels to the extent and by the end of the period for which it had bound itself, a liability for demurrage well might be found to be the natural and probable result of this default of the defendant, and one which ought to have been within the contemplation of the parties. It was not like the expenses disallowed in *Globe Refining Co.* v. *Landa Cotton Oil Co.* 190 U. S. 540, 546, which would have been incurred by that plaintiff in any event, but was an additional expense caused to the plaintiff by the defendant's breach of its contract. It was like the increased freight rates allowed in *Merrimack Manuf. Co.* v. *Quintard*, 107 Mass. 127.

Exceptions overruled.

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EDWIN H. MARKS *vs.* L. ROGER WENTWORTH.

Suffolk. March 25, 1908. — May 20, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Practice, Criminal, Placing indictment or complaint on file, Probation. *Placing on File. Probation. Statute.*

An indictment or complaint cannot lawfully be placed on file without the consent of the defendant, who has a right to have his case finally disposed of without unreasonable delay.

Although the provisions of R. L. c. 217, § 84, c. 220, § 2, in regard to putting persons charged with crime upon probation, do not say in terms that, if after a season of probation the object of the probation seems to be accomplished in such a way as not to require any punishment of the defendant, either for his own reformation or in the interests of the public, the court may dispose finally of the case by dismissing it, such a power is required for the exercise of the large discretion conferred upon the courts by the statute and is given by necessary implication.

KNOWLTON, C. J. This is a petition for a writ of mandamus * to compel the respondent, who is the standing justice of the Police Court of the City of Somerville, to bring forward on the docket a criminal case pending in that court against the petitioner, and to impose sentence, or otherwise to make a final disposition of the case.

The complaint against the petitioner was for an assault and battery. There was a trial in the police court before the respondent, who found the petitioner guilty. The case was then continued, and the probation officer was instructed to investigate the facts relating to it and report to the court. The petitioner was then under a recognizance; but afterwards, with his consent, he was placed on probation with the probation officer, and the case was continued several times. At the continuance next before the last one, the petitioner, for the first time, objected to a further continuance and requested that sentence be imposed. For a good reason the court again continued the case, and when it was afterwards reached, the petitioner's wife, upon whom the assault was alleged to have been committed, appeared at the request of the court, and said that she and her husband

* Reported by *Braley*, J., for determination by the full court.

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were living together and that everything was all right between them. The respondent then intimated that he was willing to place the case on file, but the petitioner objected and argued against it. Thereupon the court took the case under advisement and continued it eight days. When it came up at the expiration of this time, the petitioner asked that sentence be imposed. The respondent stated that, as the petitioner had been put on probation and the object of the probation seemed to have been accomplished, he deemed the only proper disposition of the case was to place it on file, and the court so ordered. The petitioner claimed an appeal, which the court refused.

It has long been the practice in this Commonwealth for a court, with the consent of the defendant, after a verdict or plea of guilty in a criminal case, when for good cause it seems best not to impose sentence immediately, to place the case on file. This practice has been recognized by statute and approved by this court. The effect of it is fully stated in *Commonwealth* v. *Dowdican's Bail*, 115 Mass. 133. See also *Commonwealth* v. *Foster*, 122 Mass. 317, 323; *Commonwealth* v. *Maloney*, 145 Mass. 205. The case then stands on the records of the court, and although usually no further proceedings are had in it, it may at any time be called up and sentence may be imposed, or some other final disposition may be made of it. But the case cannot properly be placed on file without the consent of the defendant. He has a right to have it finally disposed of, without unreasonable delay, so that he will not be liable for an indefinite period to be brought into the court and subjected to punishment. Although this practice formerly prevailed only in the higher courts, it was extended by statute to the police, district and municipal courts. R. L. c. 160, § 89. St. 1898, c. 396, § 54. But when the statute gave to these courts authority to place complaints on file, it did not authorize such a disposition of a case against the objection of the defendant.

The order made by the respondent in this case, was, therefore, irregular. The petitioner cannot be compelled to remain for years subject to the risk of being sentenced on this complaint, if at any time the public authorities should choose to bring him before the court for that purpose.

If the order be given any effect, it leaves the case still in

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court, subject to be disposed of hereafter. If it be treated as invalid, the case remains as it was before the order was made. The petitioner is, therefore, entitled to an order or judgment from the police court which shall finally dispose of the prosecution in that court.

It remains to consider the effect of the probation of the petitioner under the order of the court. R. L. c. 217, § 84; c. 220, § 2. Although the statute does not say in terms that if, after a season of probation, the object of the probation seems to the court to have been accomplished, in such a way as not to require any punishment of the defendant, either for his own reformation or in the interests of the public, the court may finally dispose of the case by a dismissal of it, we think this logically follows from the principles which lie at the foundation of the legislation, and from the general provisions which seem to leave the whole matter in the control of the court. Probation looks to reformation and not to a final goal of punishment. See Pub. Sts. c. 212, § 76. Why should one be put upon probation if he must be subjected to punishment, notwithstanding that the result of as long a period of trial as is deemed reasonable proves him to be worthy, and shows that the interests of the community, as well as of himself, will be promoted by holding him no longer amenable to the law for his offense? We are of opinion that the large discretion that is given to a court, in such cases, includes jurisdiction to dismiss the prosecution, and finally to discharge the defendant after a period of probation, if that seems best. Undoubtedly, placing a case on file with the consent of the defendant will generally be a better disposition of such a prosecution than a dismissal of it, and often unwillingness of a defendant to consent to an order placing the case on file might be deemed an indication that he ought not to be finally relieved from accountability at that time. But if for any reason the judge should think it better, in the interest of law and justice, to dismiss the case rather than to place it on file, we are of opinion that the statutes give him authority so to do. See *Commonwealth* v. *McGovern*, 183 Mass. 288.

In the present case, if the adjudication of the court had been that the object of the probation seemed to be accomplished, and that therefore the complaint was dismissed and the defendant

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discharged, the petitioner would have had no ground of complaint, or if a sentence had been imposed, he would have had a right to appeal.

Writ of mandamus to be issued.

E. S. Bacon, for the petitioner.

J. J. Higgins, District Attorney, for the respondent, submitted a brief.

THOMAS F. GARVEY *vs.* CITY OF LOWELL.

Middlesex. March 25, 1908. — May 20, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Civil Service. Board of Health, Municipal.

In an action against a city by one who was employed as foreman of the yard of the health department of the defendant and is alleged to have been discharged in violation of the civil service laws by a vote of the board of health of the defendant purporting "to abolish the position of foreman of the yard in the spirit of economy," the plaintiff may introduce evidence to show that the position which he occupied was not abolished in good faith for reasons of economy, but that the vote of the board of health was a mere pretext or device to get rid of the plaintiff on account of his refusal to render political service for one of the members of the board.

One who is employed as foreman of the yard of the health department of a city is engaged in the labor service of the city and is not the holder of an office within the meaning of that term as used in the civil service laws.

CONTRACT for wages for services as foreman of the yard of the health department of the defendant from March 28, 1907, to the date of the writ. Writ dated July 17, 1907.

At the trial in the Superior Court before *Bell*, J., the facts appeared in evidence which are stated in the opinion or are there referred to as warranting the findings stated. At the close of the evidence the defendant asked the judge to make the following rulings, besides others which have become immaterial:

"1. On all the evidence the plaintiff is not entitled to recover.

"2. The records of the board of health are conclusive upon the question as to the reason why the position of yard foreman was abolished, if it was abolished, and we cannot go behind them."

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"5. The position of foreman of the yard in the Lowell health department is an 'office,' which could be abolished by the board of health."

The judge refused to make any of these rulings. He submitted the following questions to the jury, which the jury answered as stated after each:

"1. Was the vote of March 28, 1907, abolishing the position of yard foreman, a mere pretext or device to get rid of the plaintiff?" "Yes."

"2. Was said vote passed in good faith on grounds of economy?" "No."

"3. Were the duties of the office substantially transferred to some other person employed for the purpose of taking them?" "No."

"4. Was the action of the board of health taken because of the plaintiff's refusal to render some political service?" "Yes."

The amount of damages being agreed upon by counsel for both parties, the judge ordered a verdict for the plaintiff in the sum of $293, and, at the request of the defendant, reported the case for determination by this court. If the rulings of the judge were erroneous in law, a new trial was to be granted; otherwise, judgment was to be rendered on the verdict.

S. E. Qua, for the plaintiff.

J. G. Hill, for the defendant.

SHELDON, J. The plaintiff was in the employ of the defendant as foreman of the yard of its health department. It is agreed that he was entitled to whatever protection the civil service laws might afford him. St. 1904, c. 314. He was discharged from his employment under a vote of the board of health of the defendant, purporting "to abolish the position of foreman of the yard in the spirit of economy." The jury have found however that this vote was a mere pretext or device to get rid of the plaintiff, that it was not passed in good faith on grounds of economy, and that this action was taken because of the plaintiff's refusal to render some political service. The evidence on which these findings were made was admitted subject to the defendant's exception; and the first question to be considered is whether this evidence was competent.

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The defendant's counsel contends that the records of the board are conclusive as to the reason why the plaintiff's position was abolished. He relies mainly upon the decision in *Stratton* v. *Lowell*, 181 Mass. 511, in which it was held that the court could not go behind the record of this board to show that it had had a different and an unlawful reason for the selection of a particular garbage cremator from the lawful reason which the board had declared by its vote and had spread upon its record. And see *Halleck* v. *Boylston*, 117 Mass. 469; *Judd* v. *Thompson*, 125 Mass. 553; *Taylor* v. *Henry*, 2 Pick. 397; *Third School District in Stoughton* v. *Atherton*, 12 Met. 105. But the record of the doings of the board of health, which is not required to keep any such record, does not come under the rule of the cases last cited; and the real point of the decision in *Stratton* v. *Lowell*, *ubi supra*, was not that the record of this board was in itself conclusive, but that when it was its duty to pass upon the expenditure of a valid appropriation properly made for a purpose within the scope of its authority, the court was bound by its declaration that in making or arranging to make that expenditure it was acting upon the independent judgment which it was its duty to form. That was a different question arising from a different state of facts from what is now presented. It is provided by St. 1904, c. 314, § 1, that "every person holding office or employment in the public service of the Commonwealth or in any county, city or town thereof, classified under the civil service rules of the Commonwealth, shall hold such office or employment and shall not be removed therefrom, lowered in rank or compensation, or suspended, or, without his consent, transferred from such office or employment to any other except for just cause and for reasons specifically given in writing." And the second section of this act, as amended by St. 1905, c. 243, provides for notice and hearing before any final action is had under § 1 already quoted. Upon the findings of the jury, the action of the board of health was intended to deprive the plaintiff of the rights secured to him by this statute, and to prevent him, by a false recital in the vote of the board, from obtaining the redress which the Legislature had intended to secure to him. We do not consider that we are required to allow such a board to nullify the plain and salutary provisions of this statute by simply covering their unlawful act

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with a virtuous name. There is a real and fundamental distinction between the laudable abolition of an unnecessary position and the discharge of a faithful employee in violation of the rights secured to him by statute; and the latter action can neither be concealed nor protected by a pretense that it was an exercise of the former right. This was the doctrine of *Bangs* v. *Snow*, 1 Mass. 181, 188, 189.

If it be assumed that the record of the board of health is conclusive that the vote in question was passed at that meeting of the board, it by no means follows that it is also conclusive as to the alleged motive of the members who voted for it or of the board as a body in passing it. This, like the swearing in of the assessors in *Pease* v. *Smith*, 24 Pick. 122, or the real purpose of the appropriation in *Bangs* v. *Snow*, 1 Mass. 181, was not a matter necessarily to be put upon the record.

The view which we have taken of this question is in accord with decisions made in other States under somewhat similar circumstances. In *People* v. *Mayor of Brooklyn*, 149 N. Y. 215, *Kelly* v. *York*, 59 N. Y. Supp. 30, and *Sutherland* v. *Board of Street & Water Commissioners*, 32 Vroom, 436, all the reasoning of the opinions goes upon the ground that a recital in the record of a vote that an office was abolished or a resolution passed for reasons of economy could properly be contradicted by other evidence. The existence of the primary fact upon which the right to take action depended, though averred in the record, was allowed to be contradicted by parol evidence in *Benwood* v. *Wheeling Railway*, 53 W. Va. 465; *Johnson* v. *Turnell*, 113 Wis. 468; and *Rape* v. *Heaton*, 9 Wis. 328. And see to the same effect, *State* v. *Aldridge*, 66 Ohio St, 598; *Goodrich* v. *Senate*, 92 Maine, 248, 250, 251, in which the general rule is concisely stated by Strout, J.

Accordingly, we can have no doubt that the judge rightly admitted the evidence which tended to show that the plaintiff's position was not abolished in good faith for reasons of economy, but that the vote of the board of health was a mere pretext or device to get rid of the plaintiff on account of his refusal to render political service to one of the members of the board; and the findings of the jury were fully warranted by the evidence.

Nor was the plaintiff the holder of an office within the mean-

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ing of our statutes. His duties were distinctly those of one engaged in the labor service of the city. He held an employment rather than an office. The duties which according to the evidence he discharged were duties which must be performed by some one, and must be none the less performed under some designation although his nominal position should be abolished. The necessity for the performance of those duties still continued. It is not necessary to consider just what is the technical distinction between an officer and a mere employee; it is sufficient to say that upon the evidence before us the plaintiff belonged to the latter category. *Brown* v. *Russell*, 166 Mass. 14. *Attorney General* v. *Drohan*, 169 Mass. 534, 535. *Johnson* v. *Kimball*, 170 Mass. 58. *Ransom* v. *Boston*, 192 Mass. 299; *S. C.* 196 Mass. 248. *Ransom* v. *Mayor of Boston*, 193 Mass. 537. *Hill* v. *Mayor of Boston*, 193 Mass. 569. *Johnson* v. *Somerville*, 195 Mass. 370. A similar question was considered in *Water Commissioners of New Brunswick* v. *Cramer*, 32 Vroom, 270, reversing *S. C.* 28 Vroom, 478; *Corrigan* v. *Mayor of Brooklyn*, 149 N. Y. 215; *Phillips* v. *Mayor of New York*, 88 N. Y. 245. And see the cases collected in 23 Am. & Eng. Encyc. of Law, (2d ed.) 322, *et seq.*

It follows that the first, second and fifth of the rulings asked for by the defendant could not have been given; the others are made immaterial by the special findings of the jury; and upon those findings a verdict in favor of the plaintiff for the agreed amount of damages was properly ordered.

Judgment on the verdict.

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GEORGE F. VIETOR & others *vs.* CHARLES E. SPALDING & others.

Suffolk. March 25, 1908. — May 20, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Attorney at Law. Agency. Partnership.

An attorney at law, who is retained generally by a client to render such services as the client may need from time to time, is not the agent of such client to receive notice of the withdrawal of one of the members of a firm to whom the client is about to sell goods, where the attorney at the time he receives the information is not acting for the client in any way and does not know that such client has any business relations with the firm, and does not learn of such relations until after the client has sold the goods to the firm; so that, in an action for the price of the goods sold and delivered brought by the client against the members of the firm including the retiring partner, such knowledge of the attorney is no evidence of notice to the client of the withdrawal of the partner from the firm.

In an action for the price of goods sold and delivered against the members of a partnership including as an ostensible member one who had retired from the firm before the goods were purchased, it is no evidence of notice to the plaintiff of the withdrawal of this partner from the firm that an attorney at law, who was retained generally by the plaintiff to render such services as the plaintiff might need from time to time but who had no knowledge of the sale of the goods by the plaintiff to the defendants, said a few days after the date of the sale of the first item of goods in the plaintiff's account, that all the creditors knew that the retiring partner was out, how he got out and when he got out, for, even if this statement has been admitted without objection instead of being excluded as hearsay, it is too indefinite to show any notice to the plaintiff of the withdrawal of the partner, where there is nothing to show that the attorney at law in speaking generally of the knowledge of creditors had had any reason to suppose that the plaintiff was among the creditors or that he referred to the plaintiff in any way in making the statement.

KNOWLTON, C. J. This is an action to recover for merchandise sold by the plaintiffs to the defendant firm. The sale and delivery of the goods were admitted, and the only defense was by the defendant Atwood, who had ceased to be a member of the firm before the goods were sold. No notice of the dissolution of the partnership was given to the plaintiffs, and the defense was put entirely upon the contention that they had knowledge of it, or were charged with notice of it through the knowledge of Mr. Knowlton, their attorney. The jury found for the defendant. The only exception before us is to the refusal

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of the judge to direct a verdict for the plaintiffs, and the question is whether there was evidence to warrant a finding that the plaintiffs had notice, or were chargeable with notice, that Atwood had ceased to be a member of the firm before the goods were sold.

There was no evidence of notice to either of the plaintiffs personally. It was shown that Mr. Knowlton had knowledge of the change, and the only issue submitted to the jury was whether he was in the employ of the plaintiffs as their attorney in 1900, and before the sales in question, when he acquired knowledge of the withdrawal of Atwood from the firm.

There was evidence that he had been employed by the plaintiffs as their attorney more or less, for years. One of the defendants, testifying on this point, said that he knew that Mr. Knowlton was the plaintiffs' attorney in Boston, but he did not mean by that any more than that "whenever they required any legal services, he was their lawyer, and when they did not, he was not their lawyer." The defendant Atwood testified that the plaintiff Vietor "told him that Mr. Knowlton had always been their attorney for many years, that Vietor did not tell him in any form of words that Mr. Knowlton was under a continuous retainer from the plaintiffs," and that he drew an inference from this general statement that Mr. Knowlton was continuously their attorney. This was the strongest evidence in the case for the defendant. Mr. Knowlton testified that he never had a continuous retainer from the plaintiffs, that any little legal matters which came up would be brought to him and disposed of, and that when each matter was concluded there was no continuing relation between him and the plaintiffs as attorney and clients. The testimony relied on by the defendant Atwood is not necessarily inconsistent with this. But if given its greatest effect, it means no more than that Mr. Knowlton was continuously retained to render, as a lawyer, such services as the plaintiffs might at any time need. It does not appear that the knowledge that he gained of Atwood's withdrawal from the firm had any relation to the business in which he was at any time employed by the plaintiffs. His employment as a lawyer did not impose upon him the duty to act as the general manager of their business in Boston, in the matter of determining to whom

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credit should be given. There is nothing to indicate that he ever knew that they were dealing with these defendants in any way, until a long time after the sale of the goods for which the plaintiffs now seek to recover. If he had been employed to ascertain in advance who were parties to whom credit might safely be given, and who were the responsible members of firms, they would have been bound by his knowledge on this subject. But a general retainer to do business as an attorney at law does not include this kind of service. So far as appears, there was no more reason for his informing the plaintiffs of the change in the membership of this firm when he first knew it than for his giving such information in regard to any other firm in Boston in which they had no interest. The notice that came to him was not in reference to anything that he had been employed to do. Nothing had been done to extend the relation of attorney and client to any subject with which the notice was connected, or to which it in any way pertained. For this reason the plaintiffs are not chargeable with his knowledge. *Atchison, Topeka & Santa Fe Railroad* v. *Benton*, 42 Kans. 698, 707. *Stewart* v. *Sonneborn*, 49 Ala. 178. *Westfield Bank* v. *Cornin*, 37 N. Y. 320, 323. *Bierce* v. *Red Bluff Hotel Co.* 31 Cal. 161. *Wittenbrock* v. *Parker*, 102 Cal. 93. *Wyllie* v. *Pollen*, 3 De G., J. & S. 596, 601. *Haven* v. *Snow*, 14 Pick. 28, 33. *National Bank of Grafton* v. *Babbidge*, 160 Mass. 563, 565. Mechem on Agency, § 718, and cases cited. 1 Clark & Skyles on Agency, 1042–1048. 2 Clark & Skyles on Agency, 1372–1374, and cases cited.

The only other testimony on which the defendant Atwood relies is his statement, denied by Mr. Knowlton, that about March, 1900, which was only a few days after the sale of the first item of goods in the plaintiffs' account, Mr. Knowlton said, "All the creditors knew I [Atwood] was out, how I got out and when I got out." The defendant has not argued the grounds of his reliance on this statement, but if it is of any consequence, it is as evidence of the truth of the assertion. At most, it was merely a declaration, and if objection had been made, it could not have been considered as evidence of the truth of the matters asserted in it. But assuming that the jury might consider it because it was before them without objection and without a request for instructions in regard to it, we think it is too indefinite to aid the defendant.

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The plaintiffs' bill of particulars shows a credit of thirty days, which had not expired when the declaration was said to have been made. The action was not brought until two and one half years afterwards. It does not appear that Mr. Knowlton had any knowledge then, or until long afterwards, that the plaintiffs were creditors, or had ever been creditors of the defendants. We have no reason to think that there had ever been any delay in the payment of their bills as they became due, or that the plaintiffs had ever had any occasion to inform Mr. Knowlton that they had sold goods to the defendants. It is to be remembered that he was retained only as a lawyer, to do business which the plaintiffs might bring to him in that capacity. There is nothing to show that, when he was speaking generally of the knowledge of creditors, he had any reason to suppose that the plaintiffs were among the creditors, or that he referred to them in any way in making this statement. The declaration, if he made it, is not enough to warrant the jury in finding that these plaintiffs had knowledge of the change in the defendants' firm.

Exceptions sustained.

The case was submitted on briefs.

W. A. Knowlton & S. H. Tyng, for the plaintiffs.

W. F. Kimball, for the defendant Atwood.

COMMONWEALTH *vs.* THOMAS JOHNSON & others.

Suffolk. April 8, 1908. — May 20, 1908.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Possession of Burglarious Implements. Evidence, Relevancy, Competency, Of experiments, Best and Secondary, Opinion: experts, Admissions and confessions. *Practice, Criminal*, Exceptions, Conduct of trial. *Constitutional Law.*

At the trial of six defendants under R. L. c. 208, § 41, for having in their possession burglarious implements intending to use them as such, the government may put in evidence begging cards found in a tenement which the jury could find to have been the home of the defendants, as having a slight tendency to show the apparent occupation of the defendants or some of them, and as having a relation to the preliminary preparations for burglary.

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Exceptions sustained.

The case was submitted on briefs.

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COMMONWEALTH *vs.* THOMAS JOHNSON & others.

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Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Possession of Burglarious Implements. Evidence, Relevancy, Competency, Of experiments, Best and Secondary, Opinion: experts, Admissions and confessions. *Practice, Criminal*, Exceptions, Conduct of trial. *Constitutional Law.*

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At the trial of six defendants on an indictment under R. L. c. 208, § 41, for having in their possession burglarious implements intending to use them as such, a sergeant of police may be permitted to testify, after being cautioned to confine his testimony to particular instances, that a hall, near the house in which the defendants were living and in which the burglarious implements were found, had been broken into and a safe there blown open about three weeks before, if the presiding judge rules that he will admit the evidence *de bene* and will rule upon its competency later, as this evidence, if sufficiently connected with the defendants, would tend to show the intent with which they had the implements in their possession, although incidentally its effect would be to show the commission of another crime.

Where at a criminal trial the presiding judge, subject to the exception of the defendant, admits *de bene* evidence which will become relevant if connected with the defendant by other evidence, saying that he will rule upon its competency later, and the government fails to introduce the connecting evidence, if the defendant wants the evidence excluded, he must ask the judge to strike it out and to instruct the jury to disregard it, and, if he fails to do so, he cannot profit by his exception to the admission of the evidence at a time when it might have become competent.

If at a criminal trial the defendant allows certain evidence to go in without objection, and after it is in objects to it, his objection comes too late, unless the answers are not responsive to the questions, and, in that case, his remedy is to ask to have them stricken out as irresponsive.

At the trial of six defendants on an indictment under R. L. c. 208, § 41, for having in their possession burglarious implements intending to use them as such, if among the things found in the tenement where the defendants lived were a chisel and a fuse, which in themselves are lawful implements, *it seems* that it is within the discretion of the presiding judge to allow a witness against the defendants' objection to testify that within five minutes' walk from the house in which the defendants lived a certain hall was broken open and a window was forced, and to explain how chisels were used in effecting an entrance to the building and in opening the cash drawer, and that soap was put on the edges of the safe door, another witness having testified without objection that one of the ways of blowing open safes common with burglars is to pour nitro-glycerine into the crack around the door by means of a cup of soap, and to cause it to explode by a fuse, this evidence being regarded as in the nature of the narration of an experiment observed as to its effects by the witness, the admission of which is within the discretion of a presiding judge.

At the trial of six defendants on an indictment under R. L. c. 208, § 41, for having in their possession burglarious implements intending to use them as such, it was shown that after the defendants had been arrested and had been removed to the station house an envelope addressed to one of the defendants was brought by a messenger to the tenement where the defendants lived and there was received and opened by the wife of the defendant to whom it was addressed, and that, on that defendant coming in, a telegram contained in the envelope was handed to him by his wife, that this defendant declared that he did not know anything about it, that thereupon the telegram was read to him by a police officer, whereupon this defendant shook his head. There was evidence that the telegram was lost, and the presiding judge allowed the police officer who read it to the defendant and another who heard it read to testify to its contents. The defendants did not object to the admission of the contents of the telegram on general grounds, nor as inadmissible against the defendants other than the one to whom

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it was addressed, but excepted to its admission solely on the ground that the defendant to whom the telegram was addressed said that he did not know anything about it. *Held*, that this objection was untenable, as the denial of knowledge by a defendant does not make evidence against him inadmissible, and that, the paper being lost, secondary evidence of its contents was admitted properly.

It is no ground for excluding evidence of a confession of a defendant in a criminal case that it is related by the witness "in a narrative form."

Where in a criminal case a witness for the government is narrating a conversation, the judge, in the absence of a request from the defendant to limit the narration to those parts of the conversation which are competent, in his discretion may allow the witness to finish his answer in order to determine intelligently what portions of it are admissible. When this is done, if the defendant wishes to except to the admission of any portions of the conversation, he must ask to have those parts stricken out. A general exception cannot be sustained if any part of the answer is admissible.

In the trial of a criminal case it is the better practice for the presiding judge before exercising his discretion by admitting evidence temporarily, which may be made competent by other evidence introduced later, to require the prosecuting officer to state to him what he expects to prove and how he intends to connect it with the defendant, and to exclude such evidence as appears to be incompetent upon this statement.

At the trial of six defendants on an indictment under R. L. c. 208, § 41, for having in their possession burglarious implements intending to use them as such, a police inspector testified that during his conversation with one of the defendants a photograph of that defendant was shown, and the photograph then was exhibited to the jury. The photograph had been taken from the Rogues' Gallery and had written upon its back the police history of this defendant. The defendants excepted generally to the admission of the photograph in evidence, but made no objection on account of what was written on the back of it, and the attention of the judge was not called to this. It did not appear that the jury saw what was on the back of the photograph. *Held*, that the photograph was admissible on the question of the identity of the defendant whose photograph it was, and, although the writing on the back of the photograph rendered it incompetent to pass into the hands of the jury, and it should have been withheld from them if attention had been called to the matter, yet, in the absence of an exception on this ground, the verdict could not be set aside on this account.

At the trial of six defendants on an indictment under R. L. c. 208, § 41, for having in their possession burglarious implements intending to use them as such, a chief inspector of police was permitted to testify that a chisel and certain bags of cartridges, which were found in the tenement where the defendants lived, were such as ordinarily were used by burglars and such as were found upon or with them.

At the trial of six defendants on an indictment under R. L. c. 208, § 41, for having in their possession burglarious implements intending to use them as such, it was admitted that several of them lived in a tenement where all of them were found together with their coats off, and where also were found implements capable of being used for committing burglaries and many loaded firearms. There was evidence in regard to the appearance of all of them from which the jury might infer that they were at home when the police officers found them. *Held*, that upon these facts and other circumstances which appeared in evidence the judge rightly refused to order a verdict of not guilty for the several defendants.

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In a criminal case, although the failure of the defendant to testify in his own behalf cannot be used against him, inferences against him may be drawn from his failure to produce other witnesses.

At the trial of six defendants on an indictment under R. L. c. 208, § 41, for having in their possession burglarious implements intending to use them as such, where it appears that the defendants were found together in a tenement, which there was evidence was the home of all of them, and where also were found implements commonly used for committing burglaries and many loaded firearms, if the defendants fail to call any witnesses to testify in regard to their occupations and residences, their failure to do so is a circumstance proper for the consideration of the jury.

INDICTMENT, found and returned in the Superior Court in the county of Suffolk on May 11, 1907, under R. L. c. 208, § 41, charging that Thomas Johnson, John Harris, William Dolan, John Williams, Frederick Dickerson and John Owens on March 24, 1907, at Boston "knowingly did have in their possession certain machines, tools and implements adapted and designed for cutting through, forcing and breaking open buildings, rooms, vaults, safes and other depositories, in order to steal therefrom such money and other property as might be found therein, the said Johnson, Harris, Dolan, Williams, Dickerson and Owens knowing said machines, tools, and implements to be adapted and designed for the purpose aforesaid, and intending to use and employ them therefor."

At the trial in the Superior Court before *Bond*, J., the jury returned a verdict of guilty against each of the six defendants; and the defendants alleged exceptions, the judge making an order staying the execution of the sentences he had imposed until further order of the court.

The case was submitted on briefs.

J. F. Sweeney & W. J. Day, for the defendants.

M. J. Dwyer, Assistant District Attorney, for the Commonwealth.

RUGG, J. This is an indictment charging the defendants with knowingly having in their possession burglarious implements and intending to use them as such. The exceptions relate to the admission of evidence and the charge.

1. Four types of cards, all mendicant in character, were received in evidence. They were found in the tenement, which the jury may have found to have been the home of the defendants, at the time of their arrest. These had a slight tendency

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to show the apparent occupation of the defendants or some of them, and may well have a close relation to the preliminary preparations for burglary. They were properly received in evidence.

2. A sergeant of police was permitted to answer, after being cautioned to confine his testimony to particular instances, that a hall, near where the defendants were living, had been broken into and a safe blown about three weeks before, the judge saying that the evidence would be taken, and its competency ruled upon later. It is conceivable that, as bearing upon the intent with which the implements described in the indictment were in the defendants' possession, it might have appeared that the defendants used the same implements in making another break. *Commonwealth* v. *Day*, 138 Mass. 186. Although the effect of this evidence would be to show the commission of another crime, it would not thereby be incompetent upon the issue raised by the plea to this indictment. Hence the judge cannot be said to have exceeded his discretion in permitting this evidence to be introduced conditionally. When it was not so connected with the defendants by other circumstances as to make it competent for any purpose, it was then the duty of the defendants to ask the judge to strike out the evidence and to instruct the jury that they were to disregard it. Their failure to do so gives them no ground upon which to support their earlier objection. *Brady* v. *Finn*, 162 Mass. 260, 267. *Ellis* v. *Thayer*, 188 Mass. 309. *Williams* v. *Clarke*, 182 Mass. 316. *Putnam* v. *Harris*, 193 Mass. 58, 62.

It is stated in the exceptions that, after one Gleavy testified that a burglary was committed at a certain hall about five minutes' walk from where one of the defendants lived and the window forced, "At this time counsel for the defense objected to the introduction of this testimony, and upon objection being overruled," excepted. "The witness then proceeded to testify" further respecting this burglary, how chisels were used in effecting an entrance to the building and in opening the cash drawer, and soap put on the edges of the safe door. Another witness without objection testified that one of the ways of blowing open safes, common with burglars, was to pour nitro-glycerine into the crack around the door by means of a cup of soap, and causing it to explode by a fuse. It is doubtful if upon this record the

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defendants have any exception. Apparently they permitted the testimony as to the fact of burglary, its time and place, to go in without saying anything, and at its close, objecting to it. It was then too late to object, if the answers were responsive to the questions. If not, they should have moved to strike them out as irresponsive. The rest of the testimony of Gleavy went in without objection or exception. But the evidence was probably competent upon the single issue of how the chisel and fuse, found in the house of the defendants, which were lawful implements in themselves, might be used in combination with a common toilet article to effect a successful burglary. It was in the nature of an experiment observed as to its effects by the witness, and admissible within the discretion of the trial court. See *Baker* v. *Harrington*, 196 Mass. 339.

3. As the inspector and police officers were entering the tenement of the defendants on the day of their arrest, they met a man who apparently came from this tenement. After the defendants had been removed to the station house, the wife of the defendant Johnson being in the tenement, an envelope addressed to Johnson was brought by a messenger. It was opened by the wife and handed to Johnson when he came in later, who said he did not know about it. It was then read to him by the witness, a police officer, whereupon Johnson shook his head. The contents of the telegram were not objected to on general grounds, nor as against other defendants than Johnson, but on the narrow ground that Johnson said he did not know anything about it. Manifestly this ground is untenable. Mere denial of knowledge by a defendant does not make evidence against him inadmissible. There was testimony tending to show that the paper was lost, and the Commonwealth was permitted to prove its contents through the witness who read it to Johnson and another who heard it read. To this form of proving the contents of the lost paper the defendants objected. It having appeared that it was impossible to produce the original writing at the trial, secondary evidence in the form of oral testimony of its contents was admissible.* *Commonwealth* v. *McGurty*, 145 Mass. 257.

* The contents of the telegram as testified to were as follows: "Tom, blow one at a time, the house is piped. Joe."

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4. The chief inspector of police was asked to relate a conversation he had with Johnson in the presence of the other defendants. Objection was made to this question, if it was "intended to bring out any admissions, any descriptions, . . . or anything concerning any other offenses. . . ." No request was made, however, that the witness be cautioned and manifestly the objection was too broad. There appeared to be no reason why a confession made by any of the defendants was not competent. The only exception saved was in permitting the "conversation to be related in a narrative form." Construing the exception strictly in the form in which it was saved, it must be overruled. Most conversations are reproduced in evidence in a narrative form, and it is often difficult, if not impossible, for a witness to give it in any other way. Some of the evidence given by the witness in reponse to the question — for example, that relating to the names, by which the defendants were known — was admissible as bearing upon the identity of the defendants, and as tending to show that they gave fictitious names at the time of their arrest. *Commonwealth* v. *Costello*, 120 Mass. 358, 369. In the absence of a specific request from the defendants that the witness be limited in his relation of the conversation to those portions only which were competent, one course open to the judge was to permit the question to be answered in order that he might determine intelligently upon the admissibility of the conversation. It was then the duty of the defendants to ask that the portions, to which they specifically objected, be stricken out, and the jury directed not to consider them. They did not pursue this course, and hence the exception cannot be sustained. *Williams* v. *Clarke*, 182 Mass. 316. *Commonwealth* v. *Quinn*, 150 Mass. 401. With reference to this evidence as well as that of another burglary in the neighborhood by the sergeant of police above referred to, it would have been better practice for the judge to have required the district attorney to state to him what he expected to prove and how he intended to connect it with the defendants, and if it did not appear competent on this statement, to exclude whatever evidence was incompetent. But on this record it cannot be said that the defendants have a valid exception.

The inspector testified that during his conversation with the

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defendant Owens, his photograph was shown. This photograph of Owens was then exhibited to the jury, it having been taken from the Rogues' Gallery and indorsed with his police history. To the introduction of this photograph an exception was saved, but the attention of the judge was not called to, and no objection was made on account of, what was on the back of the photograph, and it does not appear that the jury saw what was on the back of it. The photograph was admissible on the question of the identity of the defendant Owens. *Commonwealth* v. *Campbell*, 155 Mass. 537. *Commonwealth* v. *Morgan*, 159 Mass. 375. What was upon the back of the photograph rendered it incompetent to pass into the hands of the jury, if attention had been called to it, but, in the absence of an exception on this ground, the verdict cannot be set aside at this time. Every argument respecting this matter was open to the defendant Owens upon his motion for a new trial.

5. The chief inspector was permitted to testify that the chisel and the bags of cartridges found in the tenement of the defendants were such as were ordinarily used by burglars, and found upon or with them. The defendants' exception to this evidence must be overruled. *Commonwealth* v. *Brown*, 121 Mass. 69, 81.

6. The judge properly refused to direct a verdict of not guilty for the several defendants. The admission that several of them lived in the tenement, where they were found, and the appearance of all of them from which the jury might infer that they were at home at the time the officers called, together with the implements capable of being used for committing burglaries, and the quantity of loaded firearms, which orderly citizens do not commonly have, together with the other circumstances appearing in evidence, were enough to warrant a verdict of guilty. *Commonwealth* v. *Tivnon*, 8 Gray, 375. *Commonwealth* v. *Day*, 138 Mass. 186. *Commonwealth* v. *Conlin*, 188 Mass. 282.

The charge of the judge respecting possession of the burglarious implements by the several defendants was in accordance with the principles laid down in *Commonwealth* v. *Tivnon*, 8 Gray, 375. The portion of the charge as to the inferences that the jury would be warranted in drawing from the failure of the defendants to call witnesses on their own behalf was carefully guarded to the extent of preserving their constitutional right

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that no inferences should be drawn from their failure to testify. But as was said by Chief Justice Holmes, in *Commonwealth* v. *Goldstein*, 180 Mass. 374, "A defendant has no general immunity from comment on his mode of conducting his defense in a criminal case." Law abiding and industrious citizens, ordinarily, are able to call witnesses, who could give evidence respecting their occupation and residence. The failure of defendants to call such witnesses is a circumstance proper for the consideration of the jury. *Commonwealth* v. *McCabe*, 163 Mass. 98. The illustration given by the judge as to the weight, which may be attached to the fact that the defendants were all in one tenement with their coats off, was not open to exception. It was a homely and pertinent test, which the jury were left to use or not, as they might find it applicable to the facts before them. The charge is not given in full, and it must be assumed that adequate instructions were given as to the general subject.

Exceptions overruled.

MARGARET HANNAFORD *vs.* MARTIN V. KINNE.
ROBERT HANNAFORD *vs.* SAME.

Middlesex. March 5, 1908. — May 21, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Landlord and Tenant, Landlord's liability to tenant. *Negligence*, Of one owning or controlling real estate.

At the trial of an action against the owner of a house containing six tenements, by the occupant of one of the tenements, to recover for injuries alleged to have been received by the plaintiff by reason of a fall upon ice which had accumulated upon some steps which were used in common by the occupants of all of the tenements, there was testimony tending to show that, a short time before the accident, the defendant had repaired the steps, that the ice had accumulated upon the steps because of water which fell thereon from a "gooseneck" which projected from a gutter on the eaves at the top of the house and that there was no conductor attached to the "gooseneck" to prevent the water from falling upon the steps. The premises were in the same condition as to the "gooseneck" at the time when the plaintiff became a tenant as they were when the ice accumulated on the steps, and the condition was obvious. *Held*, that the defendant was not liable, since the plaintiff hired the tenement with reference to its obvious condition at the time of the letting.

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TWO ACTIONS OF TORT. Writs in the Superior Court for the county of Middlesex dated April 10, 1906.

The cases were tried together before *Hardy*, J., who, at the close of the plaintiffs' evidence, ordered a verdict for the defendant, and the plaintiffs alleged exceptions.

The facts are stated in the opinion.

F. J. Carney, for the plaintiffs.

J. A. Lowell, for the defendant.

MORTON, J. These two actions, one by the female plaintiff, whom we shall speak of as the plaintiff, and the other by her husband, were tried together, and at the close of the evidence for the plaintiffs the presiding judge directed verdicts for the defendant. The cases are here on exceptions by the plaintiffs to this ruling.

The plaintiff and her husband occupied a tenement in a house belonging to the defendant. There were five other tenements in the house of which the defendant occupied one. In going down a flight of steps at the back of the house which were for the common use of all of the tenants, the plaintiff slipped and fell on the ice with which the steps were covered, and which was, as one of the witnesses testified, rough and hubbly, and received the injuries complained of. The ice was caused by water which dropped and fell on to the steps from a "gooseneck," so called, projecting from the gutter in the eaves at the top of the house. There was no conductor attached to the "gooseneck" to prevent the water from falling on to the steps. There was testimony tending to show that before the accident the defendant had repaired the steps by putting in three new treads, and had made some repairs in the tenements. So far as the gooseneck and the want of a conductor were concerned, the premises were in the same condition at the time of the accident in which they were at the time when the plaintiff and her husband hired the tenement seven months before. If the absence of a conductor and the manner in which water came down from the gooseneck on to the steps was a defect, it was an obvious one, and the plaintiff and her husband must be taken to have hired the tenement with reference to the condition of the house in that respect at the time of the letting. There is nothing to show, and it is not contended, that the defendant promised at any time

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to change the gooseneck or to put on a conductor, or to show that the gooseneck was in any different condition at the time of the accident from what it was in at the time of the letting. The fact that the defendant made repairs on the steps and in the tenements imposed on him no obligation to put on a conductor or to change the gooseneck. *Galvin* v. *Beals*, 187 Mass. 250. *Phelan* v. *Fitzpatrick*, 188 Mass. 237. The cases are governed by well settled principles, and the ruling of the presiding judge was right. *Andrews* v. *Williamson*, 193 Mass. 92. *O'Malley* v. *Twenty-Five Associates*, 178 Mass. 555.

Exceptions overruled.

ALBERT S. APSEY, receiver, *vs.* ANNA G. WHITTEMORE.

Suffolk. March 5, 6, 1908. — May 21, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

National Bank, Liability of shareholder, What makes one a shareholder, Extension of period of succession. *Bank. Corporation. Statute.*

At the trial of an action, brought by the receiver of a national bank against one alleged to have been a shareholder therein, to collect the amount of an assessment ordered by the comptroller of the currency under U. S. Rev. Sts. §§ 5151, 5234, it appeared that a receiver had been appointed, that about two years before his appointment the twenty year period of succession of the bank had expired, that proper proceedings under U. S. St. 1882, c. 290, were taken and the period of succession was extended for twenty years. Section 5 of that statute provides that, in case of such extension, any shareholder not assenting "may give notice in writing to the directors within thirty days . . . in which case he shall be entitled to receive . . . the value of" his shares "to be ascertained by an appraisal made by . . . three persons, one to be selected by such shareholder, one by the directors, and a third by the first two; and, in case the value so fixed shall not be satisfactory to any such shareholder, he may appeal to the comptroller . . . who shall cause a reappraisal to be made, which shall be final." Acting under § 5, the defendant within the thirty days allowed had given to the directors the required notice and named an appraiser, and the directors named as their appraiser the president of the bank, who was a director and large stockholder. Thereafter the defendant made all reasonable efforts to have a third member appointed, and employed counsel for that purpose, who had correspondence with an attorney of the bank, but to no purpose. The defendant did not surrender his certificate which had printed upon it a provision of the by-laws that the shares it represented were transferable only on the books of the bank in person or by attorney on the surrender of the certificate. Dividend checks were sent to the defendant, which he refused to accept and returned, asserting that he was not a shareholder. He did not use or assert any rights or privileges

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as a shareholder after the time of the extension of the period of succession. *Held*, that the action could not be maintained, since, at the time the assessment was levied, the defendant had ceased to be a shareholder.

CONTRACT by the receiver of the First National Bank of Chelsea to recover from the defendant, as a shareholder therein, an assessment levied by the comptroller of the currency under U. S. Rev. Sts. §§ 5151, 5234. Writ in the Superior Court for the county of Suffolk dated March 5, 1907.

At the trial, which was before *Hardy*, J., evidence was introduced as stated in the opinion, and he directed a verdict for the defendant and, at the request of the parties, reported the case for the consideration of this court.

G. L. Wilson, for the plaintiff.

G. H. Mellen, for the defendant.

MORTON, J. On the sixteenth day of August, 1906, the First National Bank of Chelsea closed its doors and suspended business, and on the twenty-fifth day of the same month the plaintiff was duly appointed receiver by the comptroller of the currency. On September 25, 1906, the comptroller ordered an assessment on each share of stock of $100, payable on or before October 25, 1906, and ordered the plaintiff to collect the same by proper proceedings. This is an action by the receiver to recover of the defendant the assessment upon ten shares of which she is alleged to have been the owner at the time when the assessment was levied. The presiding judge ordered a verdict for the defendant, and the case is here on exceptions by the plaintiff to the ruling thus made and to the refusal to give certain rulings that were requested. We think that the ruling was right.

The question is whether the defendant was a shareholder when the assessment was levied. The facts are undisputed. The defendant became a shareholder in 1893. On September 5, 1904, the twenty year period of succession of the bank expired. Proper proceedings were taken under U. S. St. 1882, c. 290, and the articles of association were amended so that the period of succession was extended twenty years from that date. Section 5 of that act provides "That when any national banking association has amended its articles of association as provided in this act, and the comptroller has granted his certificate of approval, any shareholder not assenting to such amendment

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may give notice in writing to the directors, within thirty days from the date of the certificate of approval, of his desire to withdraw from said association, in which case he shall be entitled to receive from said banking association the value of the shares so held by him, to be ascertained by an appraisal made by a committee of three persons, one to be selected by such shareholder, one by the directors, and the third by the first two; and in case the value so fixed shall not be satisfactory to any such shareholder, he may appeal to the comptroller of the currency, who shall cause a reappraisal to be made, which shall be final and binding; . . . and the value so ascertained and determined shall be deemed to be a debt due, and be forthwith paid, to said shareholder from said bank; and the shares so surrendered and appraised shall, after due notice, be sold at public sale, within thirty days after the final appraisal provided in this section." Within the thirty days thus provided the defendant gave the directors due notice of her desire to withdraw from the association and afterwards appointed one William R. Dresser as a member of the appraisal committee, and gave due notice of such appointment to the directors, and the directors appointed as a member one Sylvester B. Hinckley, a director of the bank and its president and a large stockholder. After waiting some months subsequent to the appointment of said Dresser and Hinckley, during which she made all reasonable efforts to have a third member appointed, but without success, the defendant, in September, 1905, employed counsel who communicated with Hinckley urging such appointment. Hinckley or the bank also employed counsel, and a correspondence, which proved ineffectual, ensued between the two attorneys in regard to the appointment. In January, 1905, the bank declared a regular dividend of three per cent and sent the defendant a check for the dividend on ten shares. The defendant promptly returned the check declaring that she was not a shareholder, and she never used or asserted any rights or privileges as a shareholder after September 5, 1904, the time when the twenty year period of succession of the bank expired. Further dividends were declared by the bank before its suspension, but none of them were sent to or received by the defendant. The defendant retained her certificate of stock and did not offer, so far as appears, to surrender it, and was credited

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on the bank's stock ledger with the ten shares. The certificate contained the provision, if that is material, that the shares were "transferable only on the books of the bank in person or by attorney on surrender of this certificate." A by-law of the bank also contained the same provision.

We think that the defendant cannot and should not be held liable as a shareholder at the time when the assessment was levied. The statute provides a method, as it is reasonable that it should, in which a shareholder who does not assent to the extension of the period of succession may withdraw from the association and have the value of his shares determined and paid to him. By pursuing the method thus prescribed, the shareholder becomes a creditor of the association to the amount of the value of his shares as thus determined, and his rights and liabilities as a shareholder cease. In the present case the defendant gave due notice that she did not assent to the extension and of her desire to withdraw from the association, and selected one person to act as a member of committee of appraisal, of which she duly notified the association, and the directors selected a second member of the committee. Down to this point the requirements of the statute were strictly followed. A third member of the committee was not, however, appointed by the two thus selected, and in consequence thereof no appraisal was made and the defendant did not surrender her shares, as it is implied by the statute that the shareholder shall do upon their appraisal and the payment of the value so determined; and the plaintiff contends that by reason thereof the defendant remained liable as a shareholder to such assessments as might be levied. But it appears from the undisputed facts, from which it is agreed that the court may draw such inferences as a jury could draw, that, for some months after the appointment of the two members of the committee, the defendant made in good faith all reasonable efforts to have the third member of the committee appointed, but without success, and finally employed counsel, whose labors were equally futile. From the fact that the bank suspended payment a little less than two years after the extension of the period of succession, it would not be an unwarrantable inference that Hinckley, the member of the committee selected by the directors, and who was also the president and a large stockholder, did not care to

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have such an investigation into the affairs of the bank as would have been necessary to appraise and determine the value of defendant's shares, and that the failure to appoint a third member of the committee was due to obstacles interposed by him to such appointment. But, however that may be, it is manifest that the defendant did all that could fairly or reasonably be required of her to secure the appointment of a third member of the committee and an appraisal of her shares. There is nothing to show that she did not act in so doing in entire good faith and honesty of purpose, or that she did not perform every duty which the statute required her to perform, to obtain an appraisal of her shares and payment of the value so determined. The case is not one where a shareholder has permitted his name to remain in outstanding certificates of stock and on the stock ledger of the bank as a shareholder, and has thereby become estopped as between himself and the creditors of the bank to deny that he is a shareholder. But it is a case where the defendant withdrew and never became a shareholder for the extended period of succession, and has continued constant in her assertion that she was not and is not a shareholder. She has not tacitly or otherwise done or assented to anything inconsistent with that position. The fact that she did not surrender or offer to surrender her certificate of stock is immaterial. She was not required to surrender it except upon payment of the appraised value. Neither is it material that the bank continued to credit her with the shares on its stock ledger. It could not by so doing make her a shareholder in an association of which she had refused and continued to refuse to remain a member, and from which she had used every means in her power to make her withdrawal effectual. Otherwise by crediting her with the stock on its books, the bank could constitute her a shareholder as to its creditors even after her stock had been surrendered. The general rule in this country, differing in that regard from the rule in England (*National Bank* v. *Case*, 99 U. S. 628), is that one who allows stock to stand in his name on the books of a banking association is liable for assessments so long as he permits the stock to stand in his name on the books, and that he will not be relieved from liability, notwithstanding he may have made an out and out transfer to another person, unless the stock has been transferred on the

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books of the bank. *Matteson* v. *Dent*, 176 U. S. 521, 530, and cases cited. In the present case, as already observed, the defendant did not allow or permit the stock to stand on the books in her name, but did everything that she could to have the shares appraised in order that she might surrender them and receive payment therefor. The general rule is moreover subject to an exception where a shareholder has transferred his stock and it is accompanied by an adequate power of attorney to make the transfer, and the certificate and the power of attorney have been delivered to the officers of the bank for the purpose of having the transfer made, but the bank officers have failed to make the transfer. In such a case it is held that the party in whose name the stock stands on the books has ceased to be a shareholder. *Earle* v. *Carson*, 188 U. S. 42. *Whitney* v. *Butler*, 118 U. S. 655. It seems to us that the case before us is more analogous to the cases last cited than to those in which a shareholder, who permitted his name to remain on the books as a shareholder after he had transferred his shares, has been held liable. It may be that the defendant could by proper proceedings have compelled the appointment of a third member of the committee and an appraisal of her shares, but we do not think that she can be held liable as a shareholder for not having done so. Whether she would have ceased to be a shareholder if all that she had done had been to send to the directors notice of her desire to withdraw and of her refusal to assent to the extension of the period of succession and nothing more, it is not necessary to consider. She, in fact, did much more than that. Indeed, it is difficult to see what more she could have done than she did to sever all relations with the association as a shareholder for the extended period of succession. She might, it is true, have surrendered and sacrificed her stock, but she was not required to do so. To construe the statute as requiring her to do so would be offering a premium for obstructive tactics on the part of the officers of the bank when a shareholder gives notice that he does not assent to the extended period of succession and desires to withdraw and to have his shares appraised and to be paid therefor, upon their surrender, the amount so determined. We are of opinion that within a fair and reasonable construction of the statute the defendant had withdrawn from the association for the extended

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period of succession and had ceased to be a shareholder at the time when the assessment was levied, and is not liable therefor. We see no error in the manner in which the presiding judge dealt with the case.

Verdict to stand.

STEPHEN JENNINGS *vs.* JENNIE W. HOWARD.

Suffolk. March 6, 1908. — May 21, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Contract, Performance and breach.

At the trial before a judge without a jury of an action for breach of a contract in writing whereby the defendant agreed to convey certain real estate to the plaintiff for the sum of $1,000 to be paid by the plaintiff on a certain day, there was evidence that, before the expiration of the time within which the money was to have been paid, an agent of the defendant interviewed the plaintiff and presented a deed to which the plaintiff objected because of an alleged defect in the acknowledgment, that the agent at the request of the plaintiff sent another deed running to a different grantee to the defendant for execution and proper acknowledgment, and that the plaintiff did not tender any cash to the agent. The plaintiff testified and the agent denied that the agent stated that he was willing to take the plaintiff's check in lieu of cash. There was no evidence of any authority of the agent to make any agreement as to the new deed or to make any agreement as to the acceptance of a check instead of cash, nor was there any evidence of a defect in the deed presented by the defendant's agent. The judge found that there was no evidence of any tender by the plaintiff either of a check or cash, and that there was no evidence of a breach of the contract by the defendant. *Held*, that the findings were warranted by the evidence.

CONTRACT by the assignee of a contract in writing for the conveyance of land by the defendant to Alfred A. Marcus and Son, for breach of the contract in failure to convey. Writ in the Superior Court for the county of Suffolk dated February 7, 1908.

There was a trial before *Fox*, J., without a jury. The terms of the contract required that Marcus and Son should pay to the defendant $1,000 on or before February 1, 1908. Other facts are stated in the opinion. The judge found that the contract was duly executed and was sufficient, but, in response to a request for a ruling, which was the fifth request, that, "if H. A. Howard agreed to accept a check for $1,000 as compliance on

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the part of the plaintiff to the terms of the contract upon the return of the deed, it is not necessary for the plaintiff to show a further tender of $1,000 before February 1, 1903, to enable him to recover in this action," he ruled, "There is no evidence of any tender either of check or cash"; and refused to rule that, "(7) upon all the evidence in the case there was evidence sufficient to warrant the court in finding that a valid contract was entered into between the defendant with Marcus; that such contract had been violated and that the plaintiff was entitled to recover damages for the breach of the contract," or that, "(8) upon all the evidence in the case the finding should be for the plaintiff." There was a finding for the defendant and the plaintiff alleged exceptions.

W. C. Cogswell, for the plaintiff.

J. K. Berry, for the defendant.

SHELDON, J. The evidence in this case warranted a finding that before the time limit named in the agreement had expired the plaintiff and the defendant's agent met for the purpose of performing the agreement; and the defendant, through her agent, offered a deed to the plaintiff. The plaintiff testified that the agent at this time said that he was willing to take the plaintiff's check for the amount due; but this was denied. The plaintiff however objected to the acknowledgment of the deed offered him; and it was arranged between the plaintiff and the defendant's agent that a new deed should be drawn running to a different grantee, and sent to the defendant in Georgia for execution by herself and her husband. There was no evidence of the agent's authority to bind her by this new arrangement. The plaintiff prepared such a deed, and it was sent to the defendant by her agent, but was not returned. The plaintiff asked the agent about the deed, and the agent said that he expected it and that there was no reason why he should not receive it the next day or very soon. Nothing further appears to have been done by the plaintiff until he brought this writ, six days after the date limited by the agreement.

It is too plain for discussion that on these facts the judge was warranted in finding for the defendant on the ground that there had been no tender by the plaintiff and nothing in the conduct of the defendant to excuse a tender. Although there was evi-

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dence that after the first deed had been offered to the plaintiff a larger offer for the property had been made to the defendant, there was no evidence and apparently no claim that she had accepted such an offer, or even that the offer was made before the date of the plaintiff's writ. Plainly this bare offer, unaccepted and in no way acted upon, could not have excused the plaintiff from making a tender or offer of performance.

And the plaintiff's requests for rulings were properly refused. As to the fifth request, the judge found that there was no evidence of any tender of either check or cash; and this finding was manifestly correct. Nor did it appear that the defendant's agent had any authority to make any such agreement as was stated in that request. As to the seventh request, the judge was not bound to find, in the absence of any offer of performance on the part of the plaintiff and of any refusal or disability to perform on the part of the defendant, that she had violated the contract. It did not appear that the deed which she had offered to the plaintiff, of the contents of which we have not been informed, was not a sufficient offer of performance by her. And we have already seen that a finding for the defendant was warranted.

Exceptions overruled.

JOHN J. SULLIVAN *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 6, 1908. — May 21, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Witness, Cross-examination. *Negligence*, Street railway. *Carrier*, Of passengers.

At the trial of an action of tort against a street railway company for injuries alleged to have been received by the plaintiff by reason of his having been assaulted by the conductor of a car, upon which he was a passenger, and expelled therefrom with an unwarranted use of force, it appeared that the conductor, whose testimony tended to prove facts inconsistent with the plaintiff's allegations, had made no report of the accident to the defendant. The conductor testified in cross-examination that he had made no report because he considered the affair insignificant and that, under the defendant's rules, whether or not a conductor should make a report was left to his discretion. Against the objec-

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tion and subject to exception by the defendant, he then was asked: "Don't you understand there is a rule applying to conductors that they shall make a report of an accident, no matter how insignificant?" and answered "Yes." *Held*, that the question was allowable in cross-examination as bearing on the conductor's real understanding of the rule, and thus to discredit his entire testimony.

If, after having discharged all its passengers at the end of its route, a street railway car has started without passengers to return to the car barn, there is, while it is in motion, no offer to accept any one as a passenger, and one who persists in an attempt to enter the car, understanding that the conductor refuses to receive him as such, and takes hold of the "grab irons" by the entrance steps, is a trespasser, and the conductor has a right to use a reasonable degree of force to prevent him from entering the car or continuing his hold upon it.

TORT for personal injuries alleged to have been received by the plaintiff while a passenger on a street car of the defendant, by reason of an "unwarranted and malicious assault" upon him by the motorman and conductor of the car. Writ in the Superior Court for the county of Suffolk dated July 15, 1904.

There was a trial before *Bond*, J. The plaintiff's evidence tended to show that, while on a street car running from Park Street in Boston to Newton, he fell asleep and went past his destination, and did not wake up until the car reached Newton, when the conductor woke him and ordered him from the car; that he said he would ride back on the car (which was going to the car barn) and would pay his fare; that the conductor nevertheless insisted upon his leaving the car and pushed him off while the car was in motion, and that both the conductor and the motorman assaulted him after he was off the car.

The defendant's evidence tended to show that, upon being awakened at Newton, the plaintiff left the car, but, as it was starting empty for the car barn, he ran, seized hold of the "grab irons," ran along beside the car for a distance, and, upon the conductor's taking hold of his hands to loosen them, seized the conductor and pulled him from the car; that no unnecessary or unwarranted force was used, and that the plaintiff was intoxicated.

Besides the evidence as to the rule stated in the opinion, the conductor had stated that he considered the affair so insignificant as not to require a report, whether or not a report should be made being left to the judgment of the conductor. The exact question objected and excepted to was: "Don't you understand

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there is a rule applying to conductors that they shall make a report of an accident, no matter how insignificant, and if he don't make such a report, it means absolute discharge?" His answer was "Yes."

Other facts are stated in the opinion.

There was a verdict for the plaintiff, and the defendant excepted.

H. J. Hart, for the defendant.

M. A. Sullivan, for the plaintiff.

SHELDON, J. 1. We cannot say that the court erred in allowing the plaintiff to cross-examine the defendant's conductor as to his understanding of the rules of the defendant relating to the duties of its conductors. The plaintiff did not seek to prove what the rule was, as in *Welch* v. *New York, New Haven, & Hartford Railroad*, 176 Mass. 393, and *Stevens* v. *Boston Elevated Railway*, 184 Mass. 476. This was not, as in the cases just cited and in *Burns* v. *Worcester Consolidated Street Railway*, 198 Mass. 63, a case in which negligence might have been found from the violation of a rule. The plaintiff's object was to discredit the story of the conductor by showing that, although he had not reported the occurrence in question, he yet understood that under the defendant's rules it was his duty to make such a report. That is, the plaintiff apparently desired to lay the foundation for an argument that the real reason for the conductor's failure to make a report was that the latter could not truthfully have done so without confessing his own misconduct, and so to contend that the conductor's story told at the trial ought not to be believed. For this purpose, it was not the rule itself, but the conductor's understanding of the rule, or rather, as the presiding justice correctly put it, his understanding of his duty under the rule, that was material. We find no error here.

2. But we are of opinion that there was error in the ruling made that, while the conductor was not bound to stop the car for the purpose of allowing the plaintiff to get upon it, and would have had the right to interfere with the person of the plaintiff to prevent his being injured, yet he had not the right to do so for the purpose of preventing the plaintiff from getting upon the car; that the conductor had no right to do this, had no right to interfere with the person of the plaintiff to loose the plaintiff's

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hold upon the car for the purpose of keeping him from getting on board. This ruling was given with reference to the contention of the defendant that the trouble with the plaintiff arose from his attempt to board the car while it was in motion, and the effort of the conductor to prevent him from doing so. It was distinctly and plainly stated to the jury, and the defendant by its exception invited the attention of the judge to the question.

In our opinion the jury should have been instructed as to this part of the case that, if the car had started upon its return trip there was, while it was in motion, no offer to accept any one as a passenger, and the conductor had a right to refuse to accept any one who sought to board the car, and, after such refusal, to use a reasonable degree of force to prevent such a person from boarding and entering the car, and for that purpose to lay hands upon him and interfere with his person, using no more force than was reasonably necessary, though he would have no right to use any excessive or unreasonable force or to attack wantonly any such intending passenger. This is the necessary result of the doctrines laid down in *Webster* v. *Fitchburg Railroad*, 161 Mass. 298, and *Merrill* v. *Eastern Railroad*, 139 Mass. 238, and is the very point of the decision in *Hogner* v. *Boston Elevated Railway*, 198 Mass. 260. So in *Solomon* v. *Manhattan Railway*, 31 Hun, 5, 8. If the plaintiff against the resistance of the conductor persisted in his attempt to board the moving car, understanding that the conductor refused to receive him as a passenger, he was a trespasser; *Massell* v. *Boston Elevated Railway*, 191 Mass. 491; and the conductor had the right to prevent him from carrying out his wrongful purpose by the use of such force as was reasonably necessary under the circumstances. If the car was not running for the transportation of passengers at all, but was merely being taken to the car barn to be put up for the night, the plaintiff's rights would be no greater than already has been stated. For any excessive force or for any wanton or reckless injury, there of course would be a liability. *McKeon* v. *New York, New Haven, & Hartford Railroad*, 183 Mass. 271.

Exceptions sustained.

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ANNA M. BERRY *vs.* GEORGE A. INGALLS.

Suffolk. March 6, 1908. — May 21, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Evidence, Opinion: experts. *Damages*. *Agency*, Scope of authority, Ratification. *Conversion*.

In an action of tort for the alleged conversion of household furniture belonging to the plaintiff, a woman, and used by her in her home, her opinion as to the value of the furniture is competent on the question of damages.

At the trial of an action of tort for the alleged conversion of household furniture of the plaintiff, it appeared that the defendant, assuming to act under a mortgage which purported to be but was not signed by the plaintiff, and of which the plaintiff had no knowledge, had taken possession of and sold the furniture and refused to return it to the plaintiff, that the plaintiff thereupon had employed an attorney at law to regain the furniture, and finally procured it by paying under protest the amount demanded by the defendant. *Held*, that the expense to which the plaintiff was put for the attorney's services constituted a proper element of damage so far as it was reasonable and proper.

At the trial of an action of tort for the alleged conversion by the defendant of household furniture of the plaintiff, there was evidence tending to show that, upon default in the conditions of a mortgage of the furniture which the defendant had accepted from the plaintiff's husband to secure a loan of money, and which purported to be but was not signed by the plaintiff and of which she had no knowledge, the defendant gave the mortgage to one whom he testified was a "professional foreclosor" who foreclosed most of his mortgages for him. The defendant also testified that all he said to the foreclosor was "to collect," but that he would not say that he had not given to him a power of attorney covering such matters; that he supposed that the foreclosor "knew what he was doing," and "had a right to do it" and that, relying on that supposition, he was willing to leave the matter to the foreclosor to do as he pleased. After the foreclosure, the plaintiff demanded her furniture of the defendant, and he refused to return it. Thereupon, after attempting for six weeks with an attorney's assistance to get possession of it without bringing any action, the plaintiff, still denying her signature to the mortgage, paid to the defendant, under protest, the amount claimed by the defendant to be due thereon, together with costs and expenses, and the furniture was returned to her. *Held*, that findings were warranted that the acts of the foreclosor either were within the scope of the authority given to him by the defendant, or were ratified by the defendant, and that the payment of the mortgage by the plaintiff, under the circumstances, did not ratify the mortgage or adopt her signature thereon.

TORT for the alleged conversion of household furniture of the plaintiff by an agent of the defendant. Writ in the Municipal Court of the City of Boston dated November 1, 1904.

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On appeal, there was a trial before *Wait*, J. The evidence introduced on behalf of the plaintiff tended to show that her husband sought of the defendant a loan upon household furniture situated where he and his wife lived, that a representative of the defendant went to the house in the absence of the plaintiff and examined the furniture, that the husband at that time signed a mortgage of the furniture which was left with him to procure thereon the signature of the plaintiff, that thereafter the husband brought the mortgage to the defendant with what purported to be the plaintiff's signature thereon, but that the plaintiff did not know that the mortgage was made and had not signed it.

In default of payment of the amount due on the mortgage note, the defendant gave the mortgage and note to one Mitchell to whom the defendant testified that he gave no other instructions than that he "told him to collect." On cross-examination, however, the defendant stated that he would not say that he gave to Mitchell a general power of attorney to look after all matters of that kind for him, nor would he say that testimony of a witness for the plaintiff, that he had seen a power of attorney in the hands of Mitchell signed by the defendant and authorizing Mitchell's acts, was false. The defendant also testified that Mitchell was "what you might call a professional foreclosser," and that he foreclosed most of the defendant's mortgages for him. In response to a question as to whether or not, in this case, he "backed up" Mitchell's actions, the defendant stated, "Well, I said I should not have anything to do with it at all. — Q. By that you mean that the matter was entirely in the hands of Mr. Mitchell, and what he did you would stand up to; isn't that exactly what you mean? A. Well, I suppose he knew what he was doing — Q. Yes. A. — and had a right to do it. — Q. And, relying upon that supposition, you were perfectly willing to leave it to him and let him do as he pleased? A. Yes, sir."

It also appeared that, after he placed the matter in Mitchell's hands, the defendant had no further knowledge of what was done by Mitchell, until demand was made upon the defendant by the plaintiff's attorney for return of the property, which he refused to do.

There also was evidence tending to show that, after the fore-

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closure, the plaintiff, though denying her signature, and the validity of the mortgage as binding her, after trying, without success, for six weeks every means that she or her counsel could devise to get possession of said furniture without bringing any action, paid to the defendant, under protest, the amount due upon said mortgage, together with some costs and expenses connected with the foreclosure of the same, and the goods were returned to her.

At the close of the evidence, the defendant requested the following rulings: "(1) If the plaintiff knew of the existence of the mortgage, and that her husband's name was signed thereto, and knew that the defendant claimed by virtue of the mortgage, and afterward paid the defendant the amount due thereon, and got a discharge of the mortgage, and received the goods back to herself, then the plaintiff ratified the mortgage, and she cannot recover. (2) If the defendant gave the mortgage and note to an attorney, with the simple instruction to collect the amount due, and took no further part in the proceedings, he is not responsible for the mistake or tort of his attorney."

The requests were refused, there was a verdict for the plaintiff and the defendant alleged exceptions.

Other facts are stated in the opinion.

G. L. Dillaway, for the defendant.

G. H. Russ, for the plaintiff.

MORTON, J. This is an action of tort to recover damages for the conversion by the defendant of certain personal property consisting of household furniture which the plaintiff alleged belonged to her. The case comes here after verdict for the plaintiff on exceptions by the defendant to the refusal of the court to give certain rulings which were requested and to the admission and exclusion of certain evidence.

The property was household furniture consisting presumably of articles in common use, and we think that as owner the plaintiff was competent to express an opinion as to their value. *Lincoln* v. *Commonwealth*, 164 Mass. 368, 380. *Shea* v. *Hudson*, 165 Mass. 43, and cases cited.

The question, "How did you happen to go to see him?" meaning the gentleman through whom she got in touch with the man to whom she sold, in June, 1907, four years after the

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alleged conversion, a carpet which constituted a part of the furniture, was plainly immaterial.

The expense to which the plaintiff was put for an attorney's services in securing the redemption and recovery of the furniture after the defendant had refused to return it, constituted a proper element of damage so far as it was reasonable and proper. It was or could have been found to be rendered necessary by the defendant's refusal to return the property, and constituted no part of the expense of the present suit for which in contemplation of law the taxable costs are full indemnity. *Atwood* v. *Boston Forwarding & Transfer Co.* 185 Mass. 557. *Stern* v. *Knowlton*, 184 Mass. 29. *Westfield* v. *Mayo*, 122 Mass. 100. *Newton Rubber Works* v. *de las Casas*, 182 Mass. 436.

The evidence warranted a finding that Mitchell was authorized by the defendant to take the furniture, or that the defendant had ratified and adopted his action in taking it, even if it could have been found that he did not originally give him authority to do so.

Whether the plaintiff had ratified and adopted what purported to be her signature to the mortgage depended upon the circumstances under which the alleged ratification or adoption took place. There was evidence tending to show that the payment relied upon by the defendant was made by her under protest in order to get possession of the furniture, and under a claim that the signature was not her signature and that the mortgage was not binding on her. Payment under such circumstances would not constitute a ratification or adoption of the mortgage, and the defendant's requests in regard to this matter and the authority of Mitchell were properly refused.

Exceptions overruled.

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NORCROSS BROTHERS COMPANY *vs.* JULIAN W. VOSE.

Suffolk. March 9, 1908. — May 21, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Contract, Construction, Performance and breach, Implied. *Damages.*

In an action by a contractor to recover a balance alleged to be due for the construction of a factory building for the defendant under a contract in writing, in which the defendant sought to recoup damages from the plaintiff for the plaintiff's delay in completing the building, the paragraph of the contract relied on by the defendant for this purpose provided that the contractor should complete the whole of the work by a day named, and that in the event of his failing to do so he should allow and pay the owner $50 for every day after the date named until the whole of the work was fully completed, with a provision that if the contractor completed the work before the day named the owner should allow and pay him $50 for every day before the date named that the work was fully completed. This was in substance the whole of the paragraph and there was no provision in it for arbitration. In a paragraph in regard to alterations there was a provision for arbitration in case either party was dissatisfied with the decision of the architect. In a paragraph in regard to delay caused by the neglect or default of the owner or by other causes named which were not the fault of the contractor, there was a similar provision for arbitration. A like provision for arbitration was contained in still another paragraph in regard to the obligation of the owner to provide all labor and materials not included in the contract in such a manner as not to delay the progress of the work. In the paragraph in regard to the payments to be made by the owner to the contractor upon certificates of the architect that such payments had become due there was no provision for arbitration. It appeared that the building was not completed until sixty-five days after the day named for completion in the contract. The defendant claimed damages for the plaintiff's delay, and the plaintiff proposed that the matter should be submitted to arbitration in the manner provided in the paragraphs of the contract containing such provisions. The defendant refused to leave the question to arbitration. *Held*, that a provision for arbitration could not be imported into the paragraph providing for liquidated damages for the owner in case of delay on the part of the contractor, and that submission to arbitration was not a condition precedent to recoupment by the defendant of his damages for such delay.

In an action by a contractor on a contract in writing, with a count on an account annexed, to recover a balance alleged to be due for constructing a building on land of the defendant, if it appears that the plaintiff constructed the building but failed to complete it within the time required by the contract and that portions of the work were defective, the plaintiff can recover on his account annexed an amount not exceeding the agreed price diminished by the amount of payments and of all damages suffered by the defendant from the plaintiff's breaches of the stipulations of the contract.

In an action by a contractor to recover a balance alleged to be due for the construction of a factory building for the defendant under a contract in writing, it appeared that by the terms of the contract all payments were to be made "upon

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written certificates of the architect to the effect that such payments have become due," that the final payment should "be made within thirty-five days after this contract is fulfilled," and "that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials." The plaintiff completed the building but failed to complete it within the time required by the contract and some of the work was defective. After the completion of the building the plaintiff sent to the defendant a bill for $16,690. This bill was returned to the plaintiff by the architect with the following indorsement upon it signed by the architect: "Approved for sixteen thousand six hundred nineteen dollars and ninety cents ($16,619.90) less the sum of allowance agreed upon." There were figures in pencil showing the deduction of $70.10. This bill was returned to the plaintiff enclosed with a letter from the architect, in which he referred to a letter from the plaintiff asking him to pass upon the questions at issue between the plaintiff and the defendant, the two main points of contention being in regard to defective concrete work and delay in the completion of the building, the architect in his letter naming $6,000 as his estimate of the amount of the allowance to be made for defective concrete work and $3,000 as his estimate of the amount to be allowed for delay, and stating at the conclusion of his letter, "Your bills are returned approved with the exception of three small items." The plaintiff contended that the written approval of the architect upon the plaintiff's final bill was a final certificate approving the payment of $16,619.90 and was conclusive as to the right of the plaintiff to receive that amount, and further, that, if this was not so, the architect's approval of the bill, taken together with his letter, was a final certificate that the allowance on account of defects in the concrete work should not be more than $6,000. *Held*, that the qualified approval of the architect on the plaintiff's bill was not a final certificate within the meaning of the contract, to be treated as conclusive evidence of performance, but that, even if it were given effect as a certificate, the architect's approval did not bind the defendant to the acceptance of either work or material which was not in accordance with the contract or preclude him from the recoupment of damages.

In an action by a contractor to recover a balance alleged to be due for the construction of a piano factory for the defendant under a contract in writing, where it appeared that the concrete floors of the building were defective and were not constructed in accordance with the specifications of the contract, and the defend ant sought to recoup damages on this account, it was *held*, that the measure of damages to which the defendant was entitled in recoupment on this account was the difference between what the value of the floors would have been if they had been constructed in accordance with the specifications and their value as built and left by the plaintiff.

In an action by a contractor to recover a balance alleged to be due for the construction of a piano factory for the defendant under a contract in writing, where it appeared that the concrete floors of the building were defective and were not constructed in accordance with the specifications, and the defendant sought to recoup damages on this account, the jury were taken to view the concrete floors and had an opportunity to see the condition of the surface and the general character of the work. The judge in his charge to the jury directed their attention to the defendant's contention that the only way in which the floors could be rendered serviceable was to reconstruct the surface by putting on the finish called for by the contract. He then instructed the jury that, if they found that

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resurfacing was not only a reasonable but a practical method of repairing the damage, their estimate of the cost of such resurfacing would be the measure of damages, but, if they deemed such repairs inexpedient or the evidence was insufficient to enable them to estimate the probable expense, they were to give the matter no further consideration. *Held*, that these instructions gave the plaintiff no cause for complaint.

CONTRACT to recover a balance of $17,994.14 alleged to be due under a contract in writing for the construction of a six story brick factory building on land of the defendant on Massachusetts Avenue at the corner of Magazine Street in Boston, with a second count upon an account annexed for the same sum of money. Writ in the Supreme Judicial Court dated January 19, 1904.

The defendant filed an answer containing a general denial and matter in recoupment, and also filed a declaration in set-off.

The contract declared on was as follows:

"This Agreement, made the thirtieth day of January in the year one thousand nine hundred and two by and between the Norcross Brothers Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts, party of the first part (hereinafter designated the Contractor), and Julian W. Vose of Boston, County of Suffolk and said Commonwealth, party of the second part (hereinafter designated the Owner),

"Witnesseth that the Contractor, in consideration of the fulfillment of the agreements herein made by the Owner, agrees with the said Owner, as follows:

"Article I. The Contractor under the direction and to the satisfaction of Harrison H. Atwood, Architect, acting for the purposes of this contract as agents of the said Owner, shall and will provide all the materials and perform all the work mentioned in the specifications and shown on the drawings prepared by the said architect for the construction and completion of a six story brick factory building with power and dry houses in connection therewith on land owned by the said Owner, and situated on Massachusetts Avenue, at the corner of Magazine Street (North) Ward 17, in said city of Boston, which drawings and specifications are identified by the signatures of the parties hereto.

"Article II. The Architect shall furnish to the Contractor such further drawings or explanations as may be necessary to

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detail and illustrate the work to be done, and the Contractor shall conform to the same as part of this contract so far as they may be consistent with the original drawings and specifications referred to and identified, as provided in Art. I.

"It is mutually understood and agreed that all drawings and specifications are and remain the property of the Architect.

"Art. III. No alterations shall be made in the work shown or described by the drawings and specifications, except upon a written order of the Architect, and when so made, the value of the work added or omitted shall be computed by the Architect, and the amount so ascertained shall be added to or deducted from the contract price. In the case of dissent from such award by either party hereto, the valuation of the work added or omitted shall be referred to three (3) disinterested Arbitrators, one to be appointed by each of the parties to this contract; and the third by the two thus Chosen; the decision of any two of whom shall be final and binding, and each of the parties hereto shall pay one-half of the expenses of such reference.

"Art. IV. The contractor shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the Architect or his authorized representatives. He shall, within twenty-four hours after receiving written notice from the Architects to that effect, proceed to remove from the grounds or buildings all materials condemned by them, whether worked or unworked, and to take down all portions of the work which the Architect shall by like written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications.

"Art. V. Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architect, the Owner shall be at liberty, after ten days written notice to the Contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this contract; and if the Architect shall certify that such refusal, neglect or failure is

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sufficient ground for such action, the Owner shall be at liberty to terminate the employment of the Contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work comprehended under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the Contractor he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the Owner in finishing the work, such excess shall be paid by the Owner to the Contractor, but if such expense shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expense incurred by the owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the Architect, whose certificate thereof shall be conclusive upon the parties.

"Art. VI. The Contractor shall complete the whole of the work comprehended in this Agreement by September 1st, 1902, in the event of failure on the part of the Contractor to so complete the whole of said work at the time herein before stated, the contractor shall allow and pay the Owner at the rate of fifty dollars ($50.00) for each and every day after said September 1st, 1902, until the whole of said work is fully completed, provided that should the Contractor complete the whole of said work before September 1st, 1902, then the owner shall allow and pay the Contractor at the rate of fifty dollars ($50.00) for each and every day prior to said September 1st, 1902, that the said work is so fully completed.

"Art. VII. Should the Contractor be obstructed or delayed in the prosecution or completion of his work by the act, neglect, delay or default of the Owner, or the Architect, or of any other Contractor employed by the Owner upon the work, or by any damage which may happen by fire, lightning, earthquake or cyclone, or by the abandonment of the work by the employees through no default of the Contractor, then the time herein fixed for the completion of the work shall be extended for a period

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equivalent to the time lost by reason of any or all of the causes aforesaid; but no such allowance shall be made unless a claim therefor is presented in writing to the Architect within twenty-four hours of the occurrence of such delay. The duration of such extension shall be certified to by the Architect, but appeal from his decision may be made to arbitration, as provided in Art. III of this contract.

"Art. VIII. The Owner agrees to provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the Contractor, agrees that he will reimburse the Contractor for such loss; and the Contractor agrees that if he shall delay the material progress of the work so as to cause any damage for which the Owner shall become liable (as above stated), then he shall make good to the Owner any such damage. The amount of such loss or damage to either party hereto shall, in every case, be fixed and determined by the Architect or by arbitration, as provided in Art. III of this contract.

"Art. IX. It is hereby mutually agreed between the parties hereto that the sum to be paid by the Owner to the Contractor for said work and materials shall be ($135,000.00), One hundred and thirty five thousand dollars subject to additions and deductions as hereinbefore provided, and that such sum shall be paid in current funds by the Owner to the Contractor in installments, as follows: ninety per cent of the value of work performed and materials delivered at the site, to be paid in monthly payments or at such other times as may be mutually agreed upon by the Owner and Contractor.

"The final payment shall be made within thirty-five days after this contract is fulfilled.

"All payments shall be made upon written certificates of the Architect to the effect that such payments have become due.

"If at any time there shall be evidence of any lien or claim for which, if established, the Owner of the said premises might become liable, and which is chargeable to the Contractor, the Owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify him against such lien or claim. Should there

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prove to be any such claim after all payments are made, the Contractor shall refund to the Owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the Contractor's fault.

"Art. X. It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

"Art. XI. The Owner may during the progress of the work maintain full insurance on said work, in his own name and in the name of the Contractor, against loss or damage by fire. The policies shall cover all work incorporated in the building, and all materials for the same in or about the premises, and shall be made payable to the parties hereto, as their interest may appear.

"Art. XII. The said parties for themselves, their heirs, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained.

"In Witness Whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

"The Norcross Brothers Co. [seal]
By Freelon Morris [seal]
Julian W. Vose [seal]

"In presence of ."

The account annexed to the declaration in set-off was as follows:

"Norcross Brothers Company.

"To Julian W. Vose Dr.

Item 1.	Overtime or overlap in not completing work as required by Article VI of contract Sept. 1, 1902 to Nov. 5, 1902 66 days @ $50.00	$3,300 00
Item 2.	259 perch of block stone foundations saved by alterations in drawings and specifications by architect, @ $6.00	1,554 00
Item 3.	Interest on $4,854.00 from Dec. 10th, 1902, to Jan. 19, 1904	822 79
Item 4.	Total	$5,176 79"

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The case was referred to James D. Colt, Esquire, as auditor. He filed a report, making the findings stated at the beginning of the opinion. The case was tried before *Rugg*, J., with a jury.

At the request of the defendant the jury viewed the concrete floors in the defendant's factory. The plaintiff introduced in evidence the contract, printed above, upon which the action was brought, and also the specifications. The plaintiff read the auditor's report, and rested. The defendant introduced evidence to show the defective character of the concrete work in the building and the amount of delay for which the plaintiff was responsible.

The facts reported by the auditor on which the plaintiff founded its contention, that the architect had made a final certificate under article ten of the contract, were as follows:

On February 3, 1903, the following bill was sent to the defendant:

"Worcester, Mass., Feb. 3, 1903.

"Vose & Sons Piano Co.,

"To the Norcross Brothers Co., Dr.

1902.	Nov. 24	Bill rendered	$16,532 82
1903.	Jan. 29	" " voucher attached	97 67
	Feb. 3	" " " "	27 50
	" "	" " " "	32 01
			$16,690.00"

On March 9 the architect returned this bill, having deducted $70.10 from the total (as appeared by his figures in pencil) and having written the following approval on the face of the bill:

"Approved for sixteen thousand six hundred nineteen dollars and ninety cents ($16,619.90) less the sum of allowance agreed upon.

"Harrison H. Atwood, Arch't."

The bill was returned with a letter written by the architect.

On March 2 the plaintiff, by Mr. O. W. Norcross, wrote a long letter to the architect, reciting claims made by Mr. Vose for damages resulting from faulty work of Simpson Brothers, and for an allowance for delay in completion of the building, and denying that the delay was due to any act or neglect of the Norcross Brothers Company, or that it was in any way responsible therefor. The letter went on to state in detail a large

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number of causes of delay directly attributable to the defendant or his architect, admitted that Simpson Brothers caused a part of the delay, and asked that the subject be reviewed and an early decision rendered.

The letter with which the architect returned the bill to the plaintiff was as follows:

"March 9, 1908.

"Norcross Bros. Co.
Tremont Building, Boston.

"Gentlemen: — In pursuance with the written request contained in your letter to me of March 2d for a written opinion as the Architect of the Vose Building relative to the question at issue between your Company and the Owner pending a final settlement of the contract, I find but two main points of contention both of which are substantially acknowledged by each party at interest;

"1st. — The defective concrete work.

"2nd. — Overlap on time allowance for finishing the building under the contract.

"Upon the first item defective concrete work, it is agreed that the only question is the amount of allowance; without going into detail I should place this at the sum of six thousand dollars ($6,000.00)

"Upon the second item that of overlap on time allowance, I should place this at sixty days, allowing therefore the sum of three thousand dollars. ($3000.00)

"It is my opinion that of this time allowance Simpson Bros. Co. are directly responsible for fifty days of the overlap by their act of neglect in not commencing their part of the work promptly at the time the building was ready, also, by unnecessary and needless delays after the commencement of their work and by the employ of negligent and incompetent workmen.

"Your bills are returned approved with the exception of three small items.

"Very truly yours,
"Harrison H. Atwood."

Other facts found by the auditor are described in substance in the opinion.

No evidence was introduced by the defendant tending to con-

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trovert the finding of the auditor that the defendant refused to arbitrate the question of delay nor tending to controvert any of the facts found by the auditor upon the question of the defendant's refusal to arbitrate that question.

The plaintiff introduced no evidence in rebuttal and at the close of all the evidence asked the justice to rule as follows:

1. As the plaintiff was not satisfied with the finding of the architect as to the amount to be allowed the defendant for delay in the construction of the building, and as it requested a reference of the matter to arbitration in accordance with the provisions of the contract, the submission of this matter to arbitration by the terms of the contract was a condition precedent to the defendant's right to receive or recover any deduction or allowance for such delay. As the defendant entirely refused to comply with this provision in the contract as to arbitration, though such arbitration was requested and demanded by the plaintiff, he cannot, as a matter of law, receive or recover any deduction or allowance whatsoever on account of the delay.

2. The written approval of the architect upon the plaintiff's final bill is a final certificate of the architect within the meaning and requirement of the contract for the sum of $16,619.90. As it does not appear and is not claimed that this certificate was obtained by any fraud or collusion on the part of the architect or the plaintiff, it is conclusive as to the performance by the plaintiff of the work covered by the contract. The defendant is not, therefore, as a matter of law, entitled to receive or recover any allowance or deduction on account of the concrete work or any other part of the building.

3. The written approval of the architect on the plaintiff's final bill, taken together with the architect's letter of March 9, is a final certificate of the architect, within the meaning and requirement of the contract, for the sum of $10,619.90, aside from allowance for delay. As it does not appear and is not claimed that this certificate was obtained by any fraud or collusion on the part of the architect or the plaintiff, it is conclusive as to the performance by the plaintiff of the work covered by the contract. The defendant is not, therefore, as a matter of law, entitled to receive or recover any further allowance or de-

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duction on account of the concrete work or any other part of the building.

The justice refused to make any of these rulings and gave other instructions to the jury.

The plaintiff excepted to the refusal of the justice to rule as requested and also excepted to the rule of damages laid down by the justice in his charge to the effect that if the jury found it was a reasonable thing for the defendant to take off the present surface of the floors and put on in its place a new surface of the character called for by the contract, they would be entitled to allow him, as damages for the failure of the plaintiff to construct floors as called for by the contract, the cost of putting on such a new surface, and then they could estimate that cost, in the absence of other evidence, from what they saw at the view of the premises.

The justice submitted to the jury the question, "How many days, if any, was the completion of the contract delayed by reason of acts for which the plaintiff was responsible?" To this question the jury answered, "forty-five days."

The jury returned a verdict for the defendant; and at the request of the parties the justice reported the case for determination by the full court. If no error was disclosed the verdict was to stand. If the plaintiff's first request for instructions should have been granted, and no other error appeared, judgment was to be entered for the plaintiff in the sum of $2,250, together with interest from December 10, 1902. If an error was disclosed in the refusal to give the second or the third instructions requested by the plaintiff or in the rule of damages laid down in the part of the charge to which the plaintiff excepted, a new trial was to be granted.

W. I. Badger & W. H. Hitchcock, for the plaintiff.

C. B. Southard, (*T. Parker* with him,) for the defendant.

BRALEY, J. This is an action brought to recover a balance claimed to be due for the erection of a building, to be used in the defendant's business as a manufacturer of pianos. The auditor to whom the case was referred having reported, that with the exception of the item for drafting plans, the plaintiff was entitled to the amount shown by the declaration, less certain deductions for defective work and materials and for failure to

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finish the building within the time named in the contract, it relied unreservedly upon the report, and, not having introduced evidence to control or vary the findings, they must be deemed to have been regarded as the basis upon which the plaintiff's right to recover finally rested. The allowance for changes in the foundations, caused by a departure from the original plans, having been conceded, the declination of the defendant to accept the amounts allowed for delay and imperfect construction of the concrete floors narrowed the controversy before the jury to these issues, respectively raised in the first item of the declaration in set-off and by the claim for recoupment. R. L. c. 174, § 1. *Blackler* v. *Boott*, 114 Mass. 24, 27. *Ford* v. *Burchard*, 130 Mass. 424. *Blood* v. *Wilson*, 141 Mass. 25.

If the evidence introduced in support of the counterclaim was competent, the jury were warranted in returning a verdict in favor of the defendant, as they could find the entire damages suffered from a failure to comply with the contract more than exceeded the entire amount demanded. The plaintiff, while taking no exception to the admission of this evidence, and offering no rebuttal, then requested the justice to rule, by the terms of the contract, the plaintiff having been dissatisfied with the decision of the architect as to the number of days chargeable to it for delay in the construction of the building and having requested arbitration of the dispute, which the defendant refused, the defendant could not recover damages from the plaintiff, as an award was a condition precedent to the right to bring suit. It also asked for a further ruling, that as the architect, under the authority conferred upon him to approve payments, had given a final certificate for the full amount demanded, the claim in recoupment could not be maintained, or, if this ruling was refused, then the defendant was bound by the allowance for defective work made by the architect, and the plaintiff was entitled to recover this balance without further deductions. We are of opinion that the denial of these requests was right. It may be assumed from the reference in the closing sentences of articles seven and eight, that the parties intended to incorporate the provisions as to arbitration found in article three, and make them applicable in the same manner to this part of the contract. If the entire contract is examined, it is seen that it

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was not the purpose of the parties, except as to the requirements of article five, to make the action taken by the architect upon the various details of construction as the work progressed final, and in this respect the contract differs from those construed in *National Contracting Co.* v. *Commonwealth*, 183 Mass. 89, 92, *Norcross* v. *Wyman*, 187 Mass. 25, and *White* v. *Abbott*, 188 Mass. 99, where the determination of the architect or supervising engineer upon such matters was held to be conclusive. See *Hebert* v. *Dewey*, 191 Mass. 403, 408. Instead, when called upon to act, his decision, if unsatisfactory to either party, was to be referred to arbitration for final settlement. But article six, upon which the set-off rests, contains no reference to either mode of adjustment. It stipulated that, if the completion of the building should be delayed beyond the time named, liquidated damages at the rate of $50 a day should be paid by the plaintiff, "until the whole of said work is fully completed." *Hall* v. *Crowley*, 5 Allen, 304. If not conceded, it was undisputed that the limit had been exceeded by sixty-five days, before the building was finished. While the auditor's decision exonerated the defendant from any breach of article eight, the plaintiff has constantly asserted that much of this delay was caused by the defendant's neglect, and default in performance, for which under the provisions of article seven he should be held liable. By construing articles six, seven and eight as dependent, and providing for a settlement without litigation of all questions of amount and value, it seeks to read into article six the arbitration clause. But if under article seven the defense of the loss of time attributable to the defendant's failure in providing materials and labor to be furnished by him was fully available under the auditor's finding, that the limitation within which the demand must be presented had been waived, the plaintiff had expressly agreed to pay a fixed amount for each day's delay, from which it had not been released. This provision was not made dependent upon the agreement for an extension of time, but is distinct. It is not a promise to pay whatever sum either the architect or arbitrators might determine, but to pay at the rate named for a definite period, even if that period might be shortened, if the plaintiff found it necessary, in avoidance, to resort to the provisions for its protection contained in article seven. The

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principal agreement to erect and finish the building for the consideration the defendant agreed to pay, and the agreement to pay liquidated damages under article six if the defendant claimed them, were independent provisions to neither of which was attached a stipulation that until the amount due had been settled by arbitration no suit for either the price or the damages should be maintained. An award not having been made a condition precedent to the right to sue, each was at liberty to resort to the courts for a settlement of their differences. *Nute* v. *Hamilton Ins. Co.* 6 Gray, 174, 181. *Rowe* v. *Williams*, 97 Mass. 163. *Hood* v. *Hartshorn*, 100 Mass. 117. *White* v. *Middlesex Railroad*, 135 Mass. 216, 219. *Reed* v. *Washington Ins. Co.* 138 Mass. 572, 576. *Clement* v. *British American Assurance Co.* 141 Mass. 298. *Hutchinson* v. *Liverpool & London & Globe Ins. Co.* 153 Mass. 143. *Lamson* v. *Prudential Ins. Co.* 171 Mass. 433. *Norcross* v. *Wyman*, *ubi supra*. *Hebert* v. *Dewey*, *ubi supra*. *Lewis* v. *Brotherhood Accident Co.* 194 Mass. 1, 4. *Hamilton* v. *Home Ins. Co.* 137 U. S. 370. *Scott* v. *Avery*, 5 H. L. Cas. 811. *Collins* v. *Locke*, 4 App. Cas. 674. *Viney* v. *Bignold* 20 Q. B. D. 172. *Dawson* v. *Fitzgerald*, 1 Ex. D. 257.

The plaintiff, although declaring on the contract, could recover only on the account annexed, and the defendant not having been deprived of the protection and benefit of the contract, the amount recoverable is limited to the agreed price, after deducting payments and all damages suffered from the plaintiff's breach of its various stipulations. *Hayward* v. *Leonard*, 7 Pick. 180. *Blood* v. *Wilson*, 141 Mass. 25. *Burke* v. *Coyne*, 188 Mass. 401, 404.

By article nine, all instalments as they accrued were payable only on the architect's certificate, and by article ten, while the certificate for the final payment is to be regarded as "conclusive evidence of the performance of the contract," even then "no payment should be construed to be an acceptance of defective work or imperfect materials." It was uncontroverted that, some time after asserting that it had completed the work, the plaintiff mailed to the defendant a bill purporting to be a statement of the full amount payable in final settlement but containing no deductions as to any of the disputed matters. While this bill was held by the architect, to whom it had been submitted, the

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architect received a letter from the plaintiff setting forth the grounds of the defendant's dissatisfaction, with a statement in reply, and requesting, that their differences might be reviewed, and decided. Having received full instructions as to the particulars of their dispute, the qualified indorsement of approval which appears upon the bill should be read in connection with the reply to the plaintiff's request. It is evident that, with these papers before him, he reached the conclusion that upon both grounds a very substantial sum should be deducted, and, after having audited and approved the items with certain minor exceptions, owing to the radical disagreement between them, left the final amount to be adjusted by the parties, if they settled according to his recommendations. Manifestly, this restricted indorsement could not have been intended, nor can it fairly be construed within the meaning of the contract, as a final certificate, which should be treated as conclusive evidence of a full performance. But, if given effect as a certificate, the architect's approval did not bind the defendant to the acceptance of either work or material not in accordance with the contract or preclude him from the recoupment of damages.

The instructions given as to the measure of damages also are said to have been in part erroneous, and misleading. The finding of the auditor that the concrete floors were not constructed in accordance with the specifications was unquestioned. Not only was the alignment imperfect and the workmanship poor, but the material used for topping, instead of being composed of the ingredients specified, showed the presence of foreign substances, which not only detracted from the appearance of the floors but being imbedded in their surface became loose as the floors were used, leaving small cavities, which as a source of dust seriously depreciated the value of the building for use as a piano factory. The plaintiff having failed to comply with the contract, and the defective work not having been accepted, the defendant could recoup as damages the difference between the value of the floors if they had been built as designed, and their value as built and left by the plaintiff. *Burke* v. *Coyne*, 188 Mass. 401, 405, and cases cited. *Eastern Expanded Metal Co.* v. *Webb Granite & Construction Co.* 195 Mass. 356.

This general rule was given and fully explained. The jury,

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however, had viewed the premises, and what they had seen as to the condition of the surface and general character of the work being evidence of its value to be considered with other testimony, the judge directed their attention to the defendant's position, that the only feasible way in which the floors could be rendered serviceable was to reconstruct the surface by putting on the finish called for by the contract. *Smith* v. *Morse*, 148 Mass. 407, 409, 410. They then were instructed, if they found that, instead of using the floors as they had been left, resurfacing was not only a reasonable but a practical method of repairing the defects, their estimate of the cost would measure the extent of the damages. But if they deemed such repairs to have been inexpedient, or the evidence was insufficient to enable them to estimate the probable expense, they were to give the matter no further consideration. These instructions being the equivalent of saying that, the plaintiff having broken the contract, the damages suffered by the defendant were measured by the difference between the value of the floors when finished in accordance with the specifications and their value in the condition in which the plaintiff left them, the plaintiff has no just cause for complaint. *Veazie* v. *Hosmer*, 11 Gray, 396. *Olds* v. *Mapes-Reeve Construction Co.* 177 Mass. 41, 43. *Hebb* v. *Welsh*, 185 Mass. 335, 337. By the terms of the report the verdict is to stand.

So ordered.

BOSTON ELEVATED RAILWAY COMPANY *vs.* COMMONWEALTH.

Suffolk. March 11, 12, 1908. — May 21, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Tax, Excise. *Boston Elevated Railway Company.*

In computing the amount of the excise tax which the Boston Elevated Railway Company is required to pay by St. 1907, c. 500, § 10, which, unless the annual dividend paid by the corporation in that year exceeds six per cent "shall be a sum equal to seven eighths of one per cent of the gross earnings of all the lines of elevated or surface railroads owned, leased or operated by said corporation," the "gross earnings" by which the amount of the excise tax is to be determined are those accruing from all lines of railway operated by the corporation in the prosecution of its business as a common carrier, excluding all income received from other corporate property.

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PETITION, filed in the Supreme Judicial Court on March 11, 1907, by the Boston Elevated Railway Company under R. L. c. 14, § 67, as amended by St. 1906, c. 349, for the repayment of the amount of an excise tax of $3,410.03, alleged to have been assessed and exacted from the petitioner without authority of law, with interest from February 25, 1907.

The case came on to be heard before *Sheldon*, J., who, at the request of the parties, reserved it upon the petition, the answer and an agreed statement of facts for determination by the full court, such order to be entered as law and justice might require.

T. Hunt, for the plaintiff.

D. Malone, Attorney General, & *F. T. Field*, Assistant Attorney General, for the Commonwealth.

BRALEY, J. The petitioner having paid a tax, or excise, assessed on its receipts from all sources for the last fiscal year, brings this petition for abatement under R. L. c. 14, § 67, as amended by the St. of 1906, c. 349, to recover the amount exacted on so much of the valuation, which is shown to have been in excess of the gross earnings derived solely from the operation of its lines of railway. Its right of recovery depends on the construction to be given to the St. of 1897, c. 500, § 10, under which the tax was laid. By the act of incorporation found in the St. of 1894, c. 548, in addition to the general taxes imposed by law on the property of street railways, the company was required by § 21 to pay a "franchise tax of not less than one per cent nor more than five per cent of the gross earnings." It may be assumed, that, as here used for the basis of taxation, the term "gross earnings" was intended to comprise all revenue from the employment of its capital in whatever manner invested. But the amendatory statute of 1897, c. 500, § 10, changed this provision by providing, that the company should pay "as compensation for the privileges herein granted, and for the use and occupation of the public streets, squares and places, by the lines of elevated and surface railroad owned, leased and operated by it . . . an annual sum, the amount of which shall, in each year ending the last day of September, be determined by the amount of the annual dividend paid in that year by said corporation, in the following manner: If the annual dividend paid is six per cent or less, or if no dividend is paid, the sum payable that year

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shall be a sum equal to seven eighths of one per cent of the gross earnings of all the lines of elevated or surface railroads owned, leased or operated by said corporation; if said dividend exceeds six per cent then a sum equal to the excess of the dividends over six per cent in addition to said seven eighths of one per cent of said gross earnings." If it were not for the immediate context, the argument of the Attorney General, that even if the taxable percentage had been lowered unless the dividends exceeded six per cent the legislative purpose to levy the excise on the total income had undergone no change, would be decisive. But if this were all, the statute might well have stopped here, as there would have been no necessity for any different valuation than before, upon which the rate after having been ascertained should be computed. The entire language of the section, however, is to be considered, and the source from which such earnings are to be derived is plainly designated. They are expressly defined to be the whole amount received from "all the lines of elevated or surface railroads owned, leased or operated by said corporation." It is the earnings from the railway in the transportation of passengers, as distinguished from all other income incidental to the business, which are taxed. It is said, moreover, that the petitioner cannot lawfully come into possession of any revenue except as produced by the railway system which it was chartered to construct, maintain and operate. In a large sense a line of railway may be treated as the entire physical plant, including track, equipment and stations, and the earnings as consisting of all financial returns from the operation of the road. If, for illustration, a station after erection was only partially needed for the use of the road, there would seem to be no question that the company might let the unused portion, and the rentals obtained, as well as interest received on bank deposits, or from money lent, would be indirectly a product of its general business. *Brown* v. *Winnisimmet Co.* 11 Allen, 326, 333. But the authority to exact an excise rests with the Legislature, by whom alone the expediency of such taxation is to be determined. Const. Mass. c. 1, art. 4. *Commonwealth* v. *People's Five Cents Savings Bank*, 5 Allen, 428, 431. *Oliver* v. *Washington Mills*, 11 Allen, 268, 274, 275. And, even if the extent of the excise may be measured or estimated by property, its imposition is not

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a taxation upon the petitioner's property, but only upon the privilege of exercising the exclusive franchise conferred by the act of incorporation. *Attorney General* v. *Bay State Mining Co.* 99 Mass. 148. *Connecticut Ins. Co.* v. *Commonwealth*, 133 Mass. 161, 163. St. 1894, c. 548. By limiting the charge specifically to "gross earnings" accruing from all lines of railway operated in the prosecution of its business as a common carrier, the exclusion of all other receipts necessarily follows. *Commonwealth* v. *Berkshire Ins. Co.* 98 Mass. 25, 29.

Inasmuch as income received from other corporate property has been erroneously included in the assessment, the petitioner is entitled to recover back the amount overpaid, with interest.

Decree accordingly.

GEORGE G. FOX COMPANY *vs.* CHARLES F. HATHAWAY & another.

Suffolk. March 12, 1908. — May 21, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Unfair Competition. Equity Jurisdiction, To restrain unfair competition.

In a suit in equity by a corporation engaged in business as a wholesale baker against the members of a firm of wholesale bakers, to restrain the defendants from unfair competition with the business of the plaintiff by selling loaves of bread made in imitation of bread manufactured and sold by the plaintiff, it appeared that the bread made and sold by the plaintiff was called "Creamalt" and that the loaves were of a size, shape, color and condition of surface which gave them a peculiar visual appearance that had come to be recognized by customers in connection with the name as indicating the place of manufacture and the quality of the bread, and that a very valuable good will had been acquired by the plaintiff in connection with the manufacture and sale of this bread, that the defendants began to manufacture and sell bread in loaves of the same size, shape, color and general visual appearance as the plaintiff's, so that an ordinary purchaser, not making a careful examination, would be likely to be deceived and to buy the defendants' bread in the belief that it was the same kind that he previously had bought of the plaintiff's manufacture, and there was evidence that the defendants' loaves were used by retailers for the purpose of such deceit, that the shape of the plaintiff's loaves was an oval one, which, although not entirely new, was uncommon, was uneconomical and less convenient for the cutting of slices and other purposes than the shapes generally adopted, and there was nothing to show that the defendants' business interests, apart from a purpose to deceive, required the combination of this shape with the size, color

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and general visual appearance that had become associated with the plaintiff's trade in "Creamalt" bread, that each of the plaintiff's loaves had on the top a small paper label containing the words "Fox's Creamalt," that the defendants on each of their loaves put a broad paper band marked "Hathaway's Log Cabin Bread, Finest Flavor, Malted," that these bands were loose and not closely attached to the loaves, so that the bands were likely not to go with the loaves from the retailer to the customer unless the retailer was careful to preserve them, and if the retailer had an inclination to palm off the defendants' loaves for those of the plaintiff the loose bands would have no tendency to prevent this. *Held*, that the defendants unnecessarily, with no apparent reason except to take advantage of the reputation built up by the plaintiff, had produced and put upon the market an imitation of the plaintiff's loaves adapted to be used in deceiving that part of the public who had only a general knowledge and recollection of that which had been recommended to them or which they had been accustomed to buy, and a decree of the trial court dismissing the plaintiff's bill was reversed.

BILL IN EQUITY, filed in the Superior Court on January 25, 1907, by a corporation engaged in doing business as a wholesale baker against the members of a firm of wholesale bakers, to restrain the defendants from unfair competition with the business of the plaintiff by selling loaves of bread made in imitation of bread manufactured and sold by the plaintiff, as described in the opinion, praying for an injunction, the assessment of damages and further relief.

In the Superior Court the case was heard by *Fox*, J., who made the following memorandum of decision:

"The case at bar is quite unlike the case of *George G. Fox Co.* v. *Glynn*, 191 Mass. 344, for the defendants' loaf without the label is easily distinguished from the plaintiff's loaf, and the two loaves are conspicuously distinguished by their labels. A small label bearing the name 'Creamalt' is pasted upon the plaintiff's loaf, and a broad paper band, bearing the name 'Hathaway's Log Cabin Bread, Malted,' encircles the defendants' loaf. I think the defendants bring themselves well within the limits of permissible competition as established in *Flagg Manuf. Co.* v. *Holway*, 178 Mass. 83."

The judge made a final decree that the bill be dismissed with costs to the defendants; and the plaintiff appealed. The evidence was reported by a commissioner appointed by the judge under Chancery Rule 35.

O. Mitchell, (*J. T. Brennan* with him,) for the plaintiff.

G. W. Anderson, (*W. C. Rogers* with him,) for the defendants.

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KNOWLTON, C. J. This is a suit founded on the alleged unfair competition of the defendants, through the sale of a certain kind of bread made in imitation of bread previously manufactured and sold by the plaintiff. The plaintiff's bread is called Creamalt, and the loaves are of a size, shape, color and condition of surface that gives them a peculiar visual appearance which has come to be recognized by customers in connection with the name, as indicating the place of manufacture and the quality of the bread. There was evidence at the hearing that, by extensive advertising and by its method of conducting its business, a very valuable good will had been acquired by the plaintiff in connection with the manufacture and sale of this bread. The facts relied on by the plaintiff to establish its rights were proved substantially as they are stated in the case of *George G. Fox Co.* v. *Glynn*, 191 Mass. 344, which relates to an interference by other defendants with the plaintiff's rights in the manufacture and sale of the same kind of bread. The plaintiff was entitled to protection against any one seeking to avail himself of a demand in the market for the plaintiff's bread.

It appeared at the hearing that the defendants began to manufacture and sell bread in loaves of the same size, shape, color and general visual appearance as the plaintiff's, such that an ordinary purchaser, not making a careful examination, would be likely to be deceived, and to buy the defendants' bread in the belief that it was of the same kind that he had previously bought of the plaintiff's manufacture. Not only was the general appearance of the defendants' loaf such as so indicate that it might easily be used to deceive purchasers who called for the plaintiff's bread, but there was considerable testimony to show that it was in fact so used by retail dealers. The evidence introduced by the plaintiff tended strongly to establish its contention that the defendants were taking advantage of the good will of its business and of the demand for its bread by putting upon the market loaves similar in appearance, of their own manufacture.

To meet the plaintiff's case the defendants called witnesses to testify that retail dealers sometimes mislead purchasers by selling other kinds of bread which are different from those called for. While perhaps this testimony weakened the force of the

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plaintiff's evidence as to the deception practised upon the public in regard to the plaintiff's bread, it fell far short of answering it.

The principal contention of the defendants is that the use by the plaintiff of this combination of size, shape, color and condition of the surface, to produce a general visual appearance for its loaf of bread, made in part of malt and milk, gives it no rights, or at least, gives it no rights against one who uses only this combination, without using the same or a similar name. It also contends that, if such a combination calls for any precautions against deception, the defendants did all that they were called upon to do for that purpose.

In the first place it appears that the oval shape adopted by the plaintiff was uncommon, although not entirely novel, and that it was uneconomical, and less convenient and satisfactory generally for the cutting of slices for all kinds of uses than the shapes generally adopted. There was nothing to show that the defendants' business interests required the combination of this shape with the same size, color and general visual appearance that had become associated with the plaintiff's trade in this Creamalt bread.

The plaintiff had no exclusive right in any one of the features of the combination, and if the defendants had required the use of this combination for the successful prosecution of their business, they would have had a right to use it, by taking such precautions as would prevent deception of the public and interference with the plaintiff's good will. But the evidence shows that the defendants had no occasion to use this combination, and therefore they were not justified in producing an imitation of the plaintiff's loaves, the natural effect of which would be to deprive it of a part of its trade through deception of the public. There are numberless shapes and sizes in which loaves of bread may be produced, and various peculiarities of appearance in color and condition of surface. These that the defendants adopted had been combined to distinguish the plaintiff's Creamalt bread, and it was the duty of other manufacturers to recognize this fact. Not, indeed, to the abandonment of their right to do what was reasonably necessary to success in the management of their own business; but to the extent of so conducting their

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business as not unreasonably and unnecessarily to interfere with the plaintiff's business through deception of the public.

But even if the defendants might have manufactured and sold loaves of this general visual appearance by carefully distinguishing their products from those of the plaintiff, they did not so distinguish them. It is to be noticed that the question is not whether dealers are liable to be deceived in buying from the manufacturer or the wholesaler, but whether the user is liable to be misled in buying from the retailer. The plaintiff's loaves are distinguished by their general appearance and a small paper label containing the words, "Fox's Creamalt," on the top of each loaf. The defendants made their loaves of the same general appearance, and put a broad paper band upon each loaf, marked:

"Hathaway's Log Cabin Bread"
"Finest Flavor, Malted."

This band had no such connection with the loaf that it would be likely to go with it from the retailer to the last purchaser, unless the retailer was careful to preserve it. If a retailer had any inclination to palm off a spurious product upon a consumer, the loose paper would have no tendency to prevent him. The defendants also had the initials "C. F. H." stamped in the bottom of their tins in which the loaves were baked. But it seems that this would not make such an impression upon the bottom of the loaf as to attract the attention of the average buyer, or to convey to him any meaning.

We are of opinion that the defendants unnecessarily, with no apparent reason except to take advantage of the reputation built up by the plaintiff, produced and put upon the market an imitation of its loaves, adapted to use in deceiving that part of the public who had only a general knowledge and recollection of that which had been recommended to them, or which they had been accustomed to buy. The principles which are stated at length in *George G. Fox Co.* v. *Glynn*, *ubi supra*, are applicable to the present case. The differences in the details of the defendants' imitation are not enough to call for a difference in the conclusion to be reached.

The case of *Flagg Manuf. Co.* v. *Holway*, 178 Mass. 83, relied on by the defendants, is materially different from the one at bar.

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In that case it was assumed in the opinion, upon findings of the master, that the form of zither that the plaintiff made, which the defendant imitated, and which was not patented, had in it certain elements of value for use and for sale which were peculiar to that form. If, quite apart from the plaintiff's good will, belonging to him as a particular manufacturer, this form of instrument was peculiarly valuable, the defendant had a right to make others like it. The only right of the plaintiff was to have the defendant's goods so marked as to indicate unmistakably that they were the defendant's and not the plaintiff's goods. Such marking, so made that persons observing as particularly as they would be likely to observe in buying a musical instrument, could easily be put upon the instruments.

In the present case there are no intrinsic advantages in the combination which produces this general visual appearance, and there are some disadvantages in it. A very different general appearance will be just as advantageous to the defendants, unless they wish by deceit to get away the plaintiff's customers.

Moreover, it is not so easy to mark loaves of bread of the same size, shape and color, in such a way that they will readily be distinguished from one another by purchasers generally, as it is so to mark musical instruments. The fundamental question in every such case is: How can the rights and interests of both parties be protected most completely and equitably?

Decree reversed.

CROHAN J. DALY *vs.* EUGENE N. FOSS & another.
WILLIAM ENDICOTT, JR. & another, trustees, *vs.* SAME.
MARY E. KEITH *vs.* SAME.

Suffolk. March 13, 16, 1908. — May 21, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Equity Jurisdiction, Laches.

In three suits in equity to enjoin the maintenance by the defendant of a garage in his building on Newbury Street in Boston in alleged violation of restrictions to which his land was subject, it appeared that the rights of the plaintiffs against the defendant, apart from the question of laches, were in all material respects

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the same as those of the plaintiff in the case of *Evans* v. *Foss*, 194 Mass. 513, in which an injunction was granted on the ground that the construction of this garage would be a violation of the restriction that no building erected on the land should be used or occupied for any business which should be "offensive to the neighborhood for dwelling houses." On the question of laches it appeared, that these suits were not brought until after the garage was completed and in operation, the plaintiffs having relied for protection on the injunction obtained by Evans, who in the meantime had sold his land to the defendant and had consented to a decree dismissing his bill. The justice who heard the case found that the defendant in completing the garage was not misled by the conduct of the plaintiffs into the belief that they and others similarly situated acquiesced in what he was doing, that the defendant did not act in good faith in reference to the rights of the plaintiffs, but pushed forward the erection of the garage with the intention of buying the land of Evans if the defendant should be unsuccessful in the suit brought by Evans, in the hope, that if the defendant completed the garage before other householders made objections, he would not be enjoined by the court from using the building as a garage, that the defendant purposely abstained from ascertaining whether other householders on the street objected to the garage, fearing that if he asked questions objections would be made, that the defendant after the decision against him bought Evans's house and land and caused the deed to be taken in the name of his clerk instead of in his own name, in part for the purpose of concealing the purchase from the owners of the other houses on the street, that for the same purpose he withheld the deed from record for more than two months, and that all this was done in the hope that, if objections were made, the later they were made the better his position would be in proceedings to enjoin him from using the building as a garage. *Held*, that there was no laches on which the defendant had a right to rely as a bar to the plaintiffs' suits, and that the injunctions prayed for should be granted.

THREE BILLS IN EQUITY, filed in the Supreme Judicial Court, the first two on July 30, 1907, and the third on August 5, 1907, to restrain the defendant Foss from allowing his building on the southerly side of Newbury Street, the erection of which as an automobile garage was declared in *Evans* v. *Foss*, 194 Mass. 513, to be in violation of the restrictions on his land, to be any longer maintained as such garage and to restrain the defendant Locomobile Company of America from any longer making use of that building as a garage.

The three cases were heard together by *Loring*, J., whose findings are stated and described in the opinion. In each of the cases the justice made a final decree granting the injunction as prayed for; and the defendants appealed.

The bill in *Evans* v. *Foss* was filed on June 4, 1906. The rescript in that case was handed down on March 1, 1907, and the garage was then substantially completed. The deed from

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Charles R. Evans to Joseph Weeks was dated April 9, 1907, but was not recorded until June 10, 1907. On April 16, 1907, a decree was entered in *Evans* v. *Foss*, by consent of parties, dismissing the bill. The defendant Locomobile Company moved in some automobiles in March and began to use the building as a garage early in April, 1907.

L. S. Dabney & H. R. Bailey, (*G. W. Mathews* with them,) for the defendant Foss.

W. R. Sears, for the Locomobile Company of America.

A. Whiteside, (*C. R. Lamson* with him,) for the plaintiff Daly and also for the plaintiffs Endicott and Warren, trustees.

M. Storey, (*J. O. Burdett & H. S. Davis* with him,) for the plaintiff Keith.

KNOWLTON, C. J. These three cases are brought to restrain alleged violations of restrictions contained in deeds of real estate, and the maintenance and use of a building as a garage, on Newbury Street in Boston. The lot and the building of the defendants are the same referred to in the case of *Evans* v. *Foss*, 194 Mass. 513. The title of the defendants, except to a small triangular piece of land which is not affected by the restrictions, is the same as it was shown to be in that case, and the titles of the several plaintiffs are derived from the same sources, include the same rights, and are subject to the same liabilities as the title of the plaintiff in that case. The additional proof as to the deeds of some portions of the original tracts conveyed to the trustees Whiting and others does not affect the rights of the present plaintiffs to have the restrictions enforced. The finding of the single justice as to the legal rights of the parties, under the deeds, leaves these cases, in this particular, precisely like the case of *Evans* v. *Foss*, and this finding is well supported by the evidence.

So, too, the finding that the building is used for a business which is "offensive to the neighborhood for dwelling houses" was in accordance with the great weight of the testimony, and it brings the cases within the former decision.

The same may be said of the finding that there has been no such change in the condition and use of the property in the neighborhood as to relieve the defendant from the binding force of the restrictions and to bring the cases within the doctrine

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applied in *Jackson* v. *Stevenson*, 156 Mass. 496. In this respect our decision must follow that in the former case.

The only question in these cases that has not been substantially covered by the decision in *Evans* v. *Foss* is whether the plaintiffs are barred by laches or estoppel. The principal ground on which the defense of laches is sustained by the courts is that it would be unfair to a defendant to wait a long time, while he is making his arrangements and adjusting his business and property to conditions which he has reason to believe will be permanent because he deems them either in conformity with law or satisfactory to others, and then to make an attack upon him, and require him to undo that which he has done innocently and at great cost. The reason for sustaining this kind of defense is similar to that on which the doctrine of estoppel depends, although it does not require that a technical estoppel be shown.

In the present case the plaintiffs had rights like those of Evans in his suit. Their rights depended upon the same deeds and the same facts. Evans alleged that the defendant Foss was violating these rights, and brought a suit to enjoin him. The decision in his case would show what decision should be made in the cases of these plaintiffs. If there were fifty other landowners whose rights were the same as his, all of whom knew that a case was pending between him and Foss to determine these disputed rights, it would be unreasonable to hold that each one of them must prosecute an independent suit with promptness, at the peril of losing by laches rights that were secured to him permanently by a deed. *Edison Electric Light Co.* v. *Sawyer-Man Electric Co.* 53 Fed. Rep. 592. *United States Mitis Co.* v. *Detroit Steel & Spring Co.* 122 Fed. Rep. 863. *Linzee* v. *Mixer*, 101 Mass. 512. *Attorney General* v. *Gardiner*, 117 Mass. 492. *Attorney General* v. *Algonquin Club*, 153 Mass. 447. *Radenhurst* v. *Coate*, 6 Grant Ch. 139. *West Arlington Improvement Co.* v. *Mount Hope Retreat*, 97 Md. 191, 205. *Proctor* v. *Bennis*, 86 Ch. D. 740, 760. *Ramsden* v. *Dyson*, L. R. 1 H. L. 129, 168. 18 Am. & Eng. Encyc. of Law, (2d ed.) 105. Such landowners well might be influenced in their conduct by knowledge that the defendant knew their rights to be the same as those of Evans, and that a decision in favor of Evans would show his violation of their rights in the same way.

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The presiding justice has found that the defendant Foss was not misled by the conduct of these plaintiffs into the belief that they, and others similarly situated, acquiesced in what he was doing. He has found that the defendant was not acting in good faith in reference to the rights of the plaintiffs, but was pushing forward the erection of the garage, with the intention of buying Evans's land if he should be unsuccessful in the suit with Evans, in the hope that, if he completed the garage before other householders made objections, he would not be enjoined by the court from using it as a garage. The justice further found that Foss abstained from ascertaining whether other house owners on the street objected, because he thought he would stand better in this respect than if he made inquiry and was told that there were objections, and that in fact he feared that, if he asked questions, objections would be made. He also found that, later, he bought Evans's house, and caused the deed to be taken in the name of his clerk instead of himself, in part for the purpose of concealing the purchase from the owners of other houses on the street, and that, for the same purpose, he withheld the deed from record in the registry for more than two months, feeling that, if other owners knew of the purchase, they would make objections, while if they did not know it they would take no action. All this was done in the hope that, if objections were made, the later they were made the better would be his position, in reference to proceedings to enjoin him from using the building as a garage.

Upon these findings we are of opinion that there was no laches of which the defendant Foss can avail himself in these suits. He has lost nothing by reason of the failure of the plaintiffs to take earlier proceedings for the enforcement of their rights. There was no such delay as, on general principles, should move a court of equity to refuse relief.

We do not mean that a party having rights can rely indefinitely upon a suit of another person to enforce a similar right, and can postpone unreasonably the assertion of his own rights, in such a way as to lead others to action, to their detriment, in a belief that he does not desire or intend to enforce them. But, in determining whether he was guilty of negligence in failing to assert his rights promptly, the fact that the defendant knew of the existence of his rights, through another person's assertion

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of similar rights depending on the same facts, may well be considered important.

Kent v. *Dunham*, 14 Gray, 279, differs materially from this case. The decision in that case was that one, desiring to take an appeal from a decree of a probate court, cannot rely upon an appeal taken by another person, but, if he wishes to save his rights, must appeal seasonably in his own name. His right to appeal is defined by the statute, and it has no existence after the expiration of the time prescribed. The rights in the present cases were created by deeds, and the question is whether the plaintiffs, by reason of negligence, have lost the opportunity of enforcing them.

The Locomobile Company of America took its title with knowledge that there might be rights like those of these plaintiffs, and left the enforcement of them to be resisted by the defendant Foss, and took protection from him against the consequences of their being asserted and upheld. It stands no better than the defendant Foss in these suits.

The cases properly call for relief by injunction.

Decrees affirmed with costs.

GEORGE H. HILL *vs.* SAVILLIAN ARNOLD & another.

Middlesex. March 15, 1906. — May 21, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Limitations, Statute of. Guardian. Bond. Words, "Discharge."

Under R. L. c. 149, § 35, an action against the sureties on the bond of the guardian of an insane person must be commenced within four years from the time of the discharge of the guardian, unless at the time of such discharge the person entitled to bring such action is out of the Commonwealth, and the fact that the ward has been under the disability of insanity during the whole of the period does not affect the application of the statute.

Under R. L. c. 149, § 35, requiring that an action against the sureties on the bond of a guardian should be commenced within four years from the time of the discharge of the guardian, the death of the guardian is a "discharge of the guardian" within the meaning of the statute.

The general provision of R. L. c. 202, § 7, that if a person entitled to bring an action is a minor, or is insane or imprisoned when the right to bring such action first

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accrues, the action may be commenced within the time limited by the statute of limitations after the disability is removed, is subject to the modification made by § 18 of the same chapter, that "if a special provision is otherwise made relative to the limitation of any action, the provisions of this chapter which are inconsistent therewith shall not apply." R. L. c. 149, § 35, in regard to the limitation of actions against the sureties on a bond given by a guardian, makes such a special provision.

APPEAL from a decree of the Probate Court for the county of Middlesex made on October 9, 1905, authorizing the petitioner to bring an action on the bond of one Willard Houghton as guardian of one George Houghton, an insane person.

The appeal came on to be heard before *Hammond*, J., who reserved it for determination by the full court, reporting the facts as agreed to by all the parties in interest. If upon the facts reported any action could be maintained against the sureties on the bond, the decree of the Probate Court was to stand; otherwise, the decree was to be set aside so far as it related to the sureties.

The case was submitted on briefs.

W. B. Grant & R. E. Joslin, for the appellants.

G. A. A. Pevey, for the appellee.

KNOWLTON, C. J. This is a petition for leave to bring a suit against the sureties upon the bond of the guardian of an insane person, and the only question in the case is whether the proposed action is barred by the statute of limitations. This statute, which is R. L. c. 149, § 35, is as follows: "No action shall be maintained against the sureties on a bond given by a guardian, unless commenced within four years from the time of the discharge of the guardian; but if at the time of such discharge the person entitled to bring such action is out of the Commonwealth, it may be commenced within four years after his return." The guardian filed his first account about a year after his appointment, and to meet the requirements of his bond he should have accounted annually afterwards. He continued as guardian for nearly ten years, until his death on January 24, 1897, and he did not file a second account. This petition was filed on March 12, 1905, the petitioner having been appointed guardian of the insane person on March 2, 1905.

The death of the guardian was the "discharge of the guardian" within the meaning of the statute. *Loring* v. *Alline*, 9 Cush. 68,

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70. *Harding* v. *Weld*, 128 Mass. 587, 591. *McKim* v. *Mann*, 141 Mass. 507. The case, therefore, comes directly within the prohibitive language of the law.

The petitioner relies upon R. L. c. 202, § 7, which is a part of the general statute of limitations of actions, and which gives to minors and insane persons for bringing "such actions" the time limited in the previous sections of the chapter, after their disability is removed. But § 18 of this chapter provides that "if a special provision is otherwise made relative to the limitation of any action, the provisions of this chapter which are inconsistent therewith shall not apply." By reason of the special provision for a limitation upon actions on guardian's bonds, these actions do not come within any of the provisions for a limitation in this chapter, and the "such actions" mentioned in the section relative to minors and insane persons do not include these actions.

The limitation as to suits upon guardians' bonds was intended to cover the whole subject of actions on such bonds. As was said in *McKim* v. *Mann*, 141 Mass. 507, 508, "This is a statute of repose. Four years are allowed within which to bring an action against the sureties. It is not the policy of the Commonwealth to keep the sureties liable for an indefinite length of time. Four years must have been assumed to be reasonable with respect to the rights of the sureties, and sufficient with respect to those interested in the ward's estate." The only exception which calls for an extension of time is when the person entitled to bring such action is out of the Commonwealth.

In *Sweet* v. *Boston*, 186 Mass. 79, 82, we find this language: "It makes no difference that the petitioners were minors, . . . inasmuch as the statute makes no exception in their favor." A question closely analogous to that in the present case was decided in *Hall* v. *Bumstead*, 20 Pick. 2, 8, in which it was said that the statute of limitations, as to actions brought against the administrator of a deceased person, applies to minors as well as to creditors of full age. The court said: "We think it would make no difference if it should appear that the ward was under the disability of infancy during the whole or a part of the time that the estate was under administration. No such disability has ever been allowed as an avoidance of this statute. On the contrary, the lapse of time under this statute has been regarded

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as an absolute bar to all claims. And we think it is right that it should be so. If the guardian died while the ward was still under age, a new guardian could have been appointed in the mode provided by law to look after her property in the hands of the former guardian, and to claim it of the surety if the principal made default or proved insolvent." This language is equally applicable to the statute now before us.

Decree reversed.

HENRY B. DAVIS *vs.* INHABITANTS OF CHILMARK & others.

Suffolk. March 16, 1908. — May 21, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

School. Chilmark. Mandamus.

At the hearing of a petition for a writ of mandamus commanding the town of Chilmark to provide a sufficient number of schoolhouses, properly furnished and conveniently located, for the accommodation of the petitioner's children, it appeared that at the time of the filing of the petition the petitioner lived with five children on the island of Noman's Land, a part of the respondent town, that there was no schoolhouse on Noman's Land, that the ages of the children were twenty-four, nineteen, seventeen, twelve and four years, that there were no other children on the island who would attend school, that the island was four miles distant from the island of Martha's Vineyard, where the main part of the respondent town was located and where it maintained a sufficient number of schools properly furnished and conveniently located. For some time previous to the filing of the petition, an arrangement had existed between the petitioner and the school committee, whereby the board and lodging of the petitioner's children of school age on the island of Martha's Vineyard and their transportation to and from there were paid by the town, but, upon the town refusing to pay such expense as to one of the children who became over fourteen years of age, the arrangement was abrogated by the petitioner, who thereupon filed this petition, contending that a school should be maintained on the island of Noman's Land. *Held*, that the contention could not be sustained and that the petition should be dismissed.

PETITION, filed in the Supreme Judicial Court for the county of Suffolk April 10, 1906, for a writ of mandamus commanding the town of Chilmark "to provide and maintain a sufficient number of schoolhouses, properly furnished and conveniently located for the accommodation of all the children of the peti-

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tioner," and commanding the town's school committee "to procure a suitable place for the schooling of" the petitioner's children, "together with fuel and all other things necessary for the comfort of the pupils therein."

There was a hearing before *Sheldon*, J., at which the following facts, besides those stated in the opinion, appeared: The names of the petitioner's children were John H., age twenty-four years, Edwin E., age nineteen years, Lina B., age seventeen years, George A., age twelve years, and Lillian G., age four years. The town of Chilmark had maintained a school on the island of Noman's Land for about thirty years previous to 1894, when the petitioner went there to reside permanently with his family, though there had been years when the school had been closed. The school had been conducted in a building which had been built by public subscription for religious worship, which building the town had fitted up as a school, and the town had provided and paid a teacher to conduct said school. In 1894, when the petitioner moved to Noman's Land with his family, he requested the town to furnish school accommodations for his children. In consequence of his request the town opened a school in a house which they hired from the petitioner, the schoolhouse being then out of repair, and provided and paid a teacher to conduct said school. During all the period of time during which the school was maintained on said island of Noman's Land, namely, from 1895 to 1898, two of the children of the petitioner attended regularly, and one or two children of fishermen, at that time resident on the island, also attended. In June, 1898, the petitioner made a report to the school committee in which he complained of the lack of progress made by the children. A meeting of the school committee was held, at which the petitioner was present, and it was agreed that the school should be closed, and that the town should pay to the petitioner $8 per week for transportation for each of his two children then of school age, namely, Edwin, age eleven years, and Lina, age nine years, and should also pay their tuition in the schools of the town of West Tisbury. The following year, the petitioner having secured a suitable place for his children to board in the town of Chilmark, on the island of Martha's Vineyard, they attended school there, and the petitioner was allowed $5.50 per

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week for transportation, having made arrangements for that amount. This arrangement continued until Edwin reached the age of fourteen years, when the school committee notified the petitioner that they would no longer pay transportation for Edwin, because he was over fourteen years of age, but that he might attend school at Chilmark without paying tuition. The petitioner demanded of the school committee that they reopen the Noman's Land school, unless the old arrangement was continued. The committee, in a letter of August 14, 1901, agreed to continue the old arrangement. The petitioner sent two children that year, namely, Lina and George, but did not send Edwin, who was over fourteen years of age. When Lina reached the age of fourteen years the petitioner notified the school committee that he could no longer continue his children at school in Chilmark on account of the lack of suitable boarding places, and the school committee agreed to allow him $3 per week for sixteen weeks, and notify him in due time whether or not they would continue such arrangement at the expiration of the sixteen weeks. The committee, by a letter dated January 11, 1904, notified him that they would after date allow him but $2 per week for each child between the ages of seven and fourteen years, and that the children over fourteen years of age might attend school, but that they would pay nothing for transportation for them. The petitioner declined to accede to this arrangement, and notified the school committee that he would hold them to their old agreement, unless they opened the school on Noman's Land.

Other facts are stated in the opinion.

The single justice dismissed the petition and reported the case for the consideration of the full court.

The case was submitted on briefs.

W. A. Morse & F. J. Geogan, for the petitioner.

C. Mitchell, for the respondents.

SHELDON, J. The petitioner asks for a writ of mandamus ordering the town of Chilmark to provide a sufficient number of schoolhouses for the accommodation of his children, and ordering the school committee of that town to provide a suitable place for the schooling of his children, together with fuel and all other things necessary for the comfort of the pupils therein.

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The petitioner lives with his family on the island of Noman's Land, which is a part of the town of Chilmark, lying about four miles from the island of Martha's Vineyard, upon which the main part of that town is situated. The town maintains no school upon Noman's Land, but has upon the main island a sufficient number of schools properly furnished and conveniently located. The petitioner's contention is that a school should be established on Noman's Land. His family is the only one residing permanently on that island, and his children are the only ones who would attend a school there. He has five children, aged respectively twenty-four, nineteen, seventeen, twelve and four years. He owns the greater part of Noman's Land, and is assessed and pays taxes on property worth about $7,000. He has always resided in Chilmark, and since 1894 on Noman's Land with his family.

Upon these facts, the petitioner's contention cannot be sustained. He has chosen to establish himself and his family upon a small island; only two of his children are under fourteen years of age; and one of these has not yet reached the age at which school attendance is required. He cannot expect the town to furnish and maintain a school for his sole benefit. *Newcomb* v. *Rockport*, 183 Mass. 74.

The situation of the petitioner and his children is doubtless an unfortunate one. The statute requires him to cause at least one of them to attend school. R. L. c. 44, § 1. He pays taxes to the town to a considerable amount. There are no regular means of communication between the island upon which he has fixed his residence and the main island upon which the public schools of the town are situated; and such communication is often difficult and sometimes impossible. Doubtless the peculiar circumstances here existing might appeal to the discretion of the town or of the school committee, and lead them to make such arrangements as might be found to be reasonably practicable, with perhaps some sacrifice also on the part of the petitioner himself, to facilitate the attendance of his children upon the public schools. R. L. c. 25, § 15. *Newcomb* v. *Rockport*, *ubi supra*. It may be a matter of regret that the parties have not been able either to continue the arrangement which existed prior to January, 1904,

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or to make such new arrangement as was then suggested by the school committee. But we can pass only upon the question of law raised by the report.

Petition dismissed.

HANNAH C. JACKSON, administratrix, *vs.* CHARLES S. ENSIGN, JR., & others.

Suffolk. March 16, 1908. — May 21, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Insolvency. Equity Pleading and Practice, Exceptions, Dismissal without prejudice. *Equity Jurisdiction. Supreme Judicial Court.*

It is within the discretion of a justice of this court presiding at the hearing on the merits of a bill in equity, filed under R. L. c. 163, § 17, seeking a reversal of a decree of the Court of Insolvency, to refuse to allow a motion of the plaintiff that the bill be dismissed without prejudice, where such motion is made after such hearing has begun; and to the exercise of such discretion no exception lies.

BILL IN EQUITY, filed in the Supreme Judicial Court for the county of Suffolk June 14, 1907, under R. L. c. 163, § 17, to reverse a decree of the Court of Insolvency upon an assignee's account. After a hearing was begun before *Loring*, J., the plaintiff moved that the bill be dismissed without prejudice, as stated in the opinion. The motion was denied, an order made that the bill be dismissed with costs, and the plaintiff excepted.

S. J. Elder & E. A. Whitman, for the plaintiff, submitted a brief.

No counsel appeared for the defendants.

BRALEY, J. After the case had been opened, and evidence offered which was excluded, the plaintiff represented to the single justice that she did not desire to prosecute further, and moved for a decree dismissing the bill without prejudice. This motion having been denied, a decree was ordered dismissing the bill with costs, and affirming the decree of the Court of Insolvency. The question is, whether, as matter of law, the plaintiff's motion should have been granted without modification. It may be conceded, if the suit is treated as an original bill for

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relief, that the plaintiff, at any time before a decree, either interlocutory or final, had been entered, upon request would have been granted an order dismissing the bill without prejudice. *Hollingsworth & Vose Co.* v. *Foxborough Water Supply District*, 171 Mass. 450. *Pullman's Palace Car Co.* v. *Central Transportation Co.* 171 U. S. 138, 145. By the provisions of R. L. c. 163, § 17, this court is given general supervisory jurisdiction of all cases in insolvency, and the exercise of the powers thus conferred must be invoked by either a bill or petition in equity. If not technically an appeal, as the suit does not stay the proceedings below, it is in the nature of an appeal, for its sole object is to revise and correct the decisions of the court of insolvency. *Lancaster* v. *Choate*, 5 Allen, 530. *Kempton* v. *Saunders*, 132 Mass. 466. Indeed in *Merriam* v. *Sewall*, 8 Gray, 316, 327, Thomas, J., said, "Such petition is in the nature of an appeal, with its legal incidents." If the incidental annoyance of a second suit involving the same issues is not sufficient to prevent the dismissal of an original bill at the plaintiff's request before decree, it would not tend to the orderly and efficient administration of the estates of insolvent debtors in process of settlement, that upon resort to this court by those aggrieved by an adverse order, the petition or bill could be discontinued as of right after trial upon the merits had begun. The petitioner, if diligent, could at once begin over, and in effect would have the benefit of a double appeal, and, while the appellate litigation was pending, further proceedings ordinarily would be suspended by the court of insolvency, where the settlement of the estate might be needlessly kept open and protracted. *Taunton National Bank* v. *Stetson*, 145 Mass. 366. *Cooke* v. *Barrett*, 155 Mass. 413. If the plaintiff had asked for leave to amend, the allowance of the amendment at that stage would have rested in the discretion of the court, but the entry of a decree of discontinuance without prejudice as an absolute right in legal effect would have conferred the same privilege, even if in the opinion of the presiding judge, justice required that, the plaintiff having had her day in court, litigation should end. Upon recurrence to the words of the statute, the court is required to "hear and determine the case as a court of equity." But, even if there is ground for the petitioner's argument that

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by analogy the general rules of equity practice are to be observed, their application ought not to be extended to include arbitrarily an anomalous bill, which, although original in the sense that relief is asked, also serves its principal function by affording a limited statutory appeal and revision. The plaintiff has not directed our attention to a decision of this court, nor have we found any, where the point now raised has been decided, and, while the rule which the plaintiff invokes might be applied, we prefer to say that whether the motion should have been granted or denied was wholly discretionary. It also follows that the affirmance of the decree of the court of insolvency at least did not harm the plaintiff, as the dismissal of the bill constituted a bar to any subsequent attempt at revision by her upon any of the grounds alleged. *Merriam* v. *Sewall*, *ubi supra*. In equity, a bill of exceptions under our procedure brings up only questions of law, and, as no error appears upon the record, the order must be,

Exceptions overruled.

SHAW STOCKING COMPANY *vs.* CITY OF LOWELL.

Middlesex. March 16, 1908. — May 21, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Municipal Corporations, Officers and agents. *Waterworks*. *Lowell*.

Acting under St. 1855, c. 435, §§ 3, 5, the city of Lowell by ordinance vested in its water board the power to conduct the city's waterworks, and, among other things, to "regulate the use of said water, and establish and collect the prices to be paid therefor, and also to do any other acts or things necessary or convenient and proper." In 1907 reasonable means of extinguishing fires were furnished by the public hydrants, but the city had not required and did not purpose to require any payment for water used in private fire service systems for the extinguishment of fires. Its water board however made a regulation requiring the measuring of water from the city's waterworks used in such systems, and the installation by the city, at the owners' expense, of meters to be used for that purpose. The principal objects of the regulation were to prevent the surreptitious or careless withdrawal of water for other purposes, and to check wastage. The water board enforced the regulation gradually, beginning with those who used water most extensively for such private fire service systems. The owner of such a system brought a bill in equity against the city to enjoin the enforcement

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of the regulation. *Held*, that the bill must be dismissed, since the regulation was reasonable and was within the powers of the water board, and since the board had not unjustly discriminated against the plaintiff in its enforcement.

BILL IN EQUITY, filed in the Superior Court for the county of Middlesex May 8, 1907, to enjoin the defendant from enforcing a regulation of its water board requiring the installation at the plaintiff's expense of detective meters to measure the water used by it in its private fire service system.

There was a hearing before *King*, J., and the evidence was taken by a commissioner. The judge made a decree dismissing the bill, and, the plaintiff appealing therefrom, reported his findings of facts together with the evidence for consideration by this court.

The facts are stated in the opinion.

G. Cunningham, for the plaintiff.

J. G. Hill, for the defendant, was not called upon.

SHELDON, J. We see no reason to doubt the authority of the water board of the defendant city to make the regulations here in question. These regulations require that all water supplied from the city's mains to the premises of any water taker for the purposes of a private fire system shall pass through a meter, and that this meter shall be furnished and set by the city at the expense of the owner of the premises served.

Authority to supply water to its citizens was first given to the city of Lowell by St. 1855, c. 435. The third section of this act empowered the city, among other things, to construct and maintain proper aqueducts and pipes, to establish public hydrants, to prescribe the purposes for which they should be used, and to change or discontinue the same; to distribute the water throughout the city, and to regulate the use of said water, and establish and collect the prices to be paid therefor, and also to do any other acts or things necessary or convenient and proper for carrying out the provisions of the act. Additional statutes have since been passed; but the power and authority of the city have not been diminished by any of them. See Sts. 1866, c. 200; 1869, c. 351; 1870, c. 321; 1893, c. 412; 1895, c. 247.

By chapter 45 of the Revised Ordinances of Lowell, the powers thus given the city have been vested in its water board, in pursuance of the permission given by St. 1855, c. 435, § 5.

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The defendant has not required and does not purpose to require in future any payment for water used in extinguishing fires. The principal object of the defendant's water board in requiring fire service pipes to be metered is to prevent the surreptitious or careless withdrawal of water through such pipes for other purposes than the extinguishment of fires; another object is to procure the measurement by meter of all water consumed for any purpose in order to check wastage and to require each taker to pay for the exact quantity of water furnished to him. The requirement is well adapted to aid in accomplishing these objects; and this is none the less so, although its operation sometimes may be circumvented by some fraudulent device. The regulation must be regarded as reasonable, unless some of the plaintiff's specific objections to it can be sustained.

The plaintiff contends that it ought not to be required to pay for the meter to be applied to its private fire service pipes. Its counsel relies upon the decisions in *Red Star Steamship Co.* v. *Jersey City*, 16 Vroom, 246; *Albert* v. *Davis*, 49 Neb. 579; *Smith* v. *Birmingham Water Works Co.* 104 Ala. 315; *Spring Valley Water Works* v. *San Francisco*, 82 Cal. 286, 316; and *Sheffield Waterworks Co.* v. *Carter*, 8 Q. B. D. 632. But these cases differ from the case at bar. They generally turned upon the language of the statutes under which they arose, or the provisions of the contracts which were before the courts. In this case, it has been found by the court below, with evident correctness, that the defendant is under no legal obligation, by contract or otherwise, to furnish the plaintiff with water for its private fire service system. Under the present circumstances, we prefer, so far as it is a matter of precedent, to follow the carefully reasoned opinions in *Sheffield Waterworks Co.* v. *Bingham*, 25 Ch. D. 443, in which the earlier case of *Sheffield Waterworks Co.* v. *Carter*, *ubi supra*, is fully discussed; and *State* v. *Gosnell*, 116 Wis. 606, decided in 1903, in which the earlier decisions are reviewed. Both upon principle and authority we are of opinion that under circumstances like those before us it is not unreasonable to require the installation of a meter at the plaintiff's own expense in its private fire service pipes.

Nor can it be said that this regulation imposes any undue burden upon the plaintiff. The defendant has afforded reason-

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able means of extinguishing fires by public hydrants; if the plaintiff desires in addition a private system for the protection of its own buildings, it is not unfair for the defendant to impose, as a condition of supplying without other charge water to make this system available, the requirement that the plaintiff shall take this water only through a meter to be put in at the plaintiff's expense. The defendant's duty to supply water at reasonable rates to all takers without discrimination, so far as this duty exists, (see *Merrimack River Savings Bank* v. *Lowell*, 152 Mass. 556, and *Lumbard* v. *Stearns*, 4 Cush. 60,) does not carry with it any obligation to supply water free of charge for the plaintiff's private system of safeguarding its property.

Nor has there been unjust discrimination against the plaintiff in the enforcement of this regulation. The rule is a general one, applicable to all persons who maintain a like private system. That it has been put in force only gradually, beginning with the worst or the most important cases, affords no reason for enjoining its enforcement in any particular case. *Parker* v. *Boston*, 1 Allen, 361. *Ladd* v. *Boston*, 170 Mass. 332. *Wagner* v. *Rock Island*, 146 Ill. 139.

Accordingly, the decree of the Superior Court dismissing the bill must be affirmed; and it is

So ordered.

C. CRAWFORD HOLLIDGE *vs.* CHARLES DUNCAN.

Suffolk. March 27, 1908. — May 21, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Agency. Negligence. Proximate Cause.

At the trial before a judge without a jury of an action of tort to recover for personal injuries alleged to have been received by the plaintiff, while walking upon a sidewalk on a public street in a city, by reason of a tongue on a dump cart owned by and in charge of an employee of the defendant either hitting the plaintiff or falling against a window and breaking glass which fell upon the plaintiff, there was evidence tending to show that the horses had been unhitched from the cart and that the tongue was left sticking up in the air, and it was admitted by the defendant, in answer to interrogatories by the plaintiff, that the cart was out of order and that the driver was trying to repair it and had asked

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a bystander to assist him, that the bystander "took hold of a blanket which was caught between the seat and the sweep of the cart and jerked it free, and, as he did so, the perch broke and the pole swung around over the sidewalk, and hit a window, breaking the glass." There was evidence that the plaintiff was hit either by the tongue or by the glass. The defendant introduced no evidence. The judge found for the plaintiff. *Held*, that the finding was warranted, both because it was within the scope of the driver's authority to procure the assistance of the bystander under the circumstances, and therefore what was done by the bystander was as if done by the driver; and also because the unexplained defective condition of the cart could have been found to have been a contributing cause of the accident.

TORT for personal injuries alleged to have been received by the plaintiff, while he was upon a sidewalk on Washington Street in Boston, by being struck either by the tongue of a dump cart owned by the defendant and in charge of an employee of his, or by glass falling from a window which the tongue fell against and broke. Writ in the Superior Court for the county of Suffolk dated March 15, 1906.

There was a trial before *Sanderson*, J., without a jury. The facts are stated in the opinion.

At the close of the plaintiff's evidence the defendant rested, and requested the judge to rule as follows: (1) On all the evidence the plaintiff cannot recover; (2) the accident happened through the negligence of an outsider and the plaintiff cannot recover; (3) if the swinging of the pole was not to be expected, the plaintiff cannot recover; (4) the proximate cause of the accident was the pulling of the blanket by an outsider and therefore the plaintiff cannot recover.

The requests were refused, there was a finding for the plaintiff, and the defendant alleged exceptions.

J. Lowell & J. A. Lowell, for the defendant.

E. F. McClennen, for the plaintiff.

MORTON, J. While the plaintiff was looking into a shop window on Washington Street, he was struck by the pole or tongue of a dump cart owned by the defendant, and loaded with gravel and standing in the street parallel with the sidewalk, or by the plate glass falling from the window broken by the pole, and received the injuries complained of. The horses had been unhitched from the cart, and the pole "was sticking up in the air" as a witness described it. In answer to written interrogatories from the plaintiff, the defendant stated that the cart was out of

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order and that the driver was trying to fix it and asked a bystander to assist him; that "the bystander took hold of a blanket which was caught between the seat and the sweep of the cart and jerked it to get it free, and as he did so the perch broke and the pole swung around over the sidewalk and hit a window, breaking the glass, some of which fell on a person standing near." The accident was described in substance as follows by a person who was passing along the street and saw it: "he noticed that the robe was caught under the sweep and that somebody came along and pulled it; that the cart lurched and the pole went a little higher and then suddenly swung around over the sidewalk and fell against the window smashing it. He saw the plaintiff struck and fall. As the pole swung around the body of the cart fell down and appeared to be wholly disconnected." On cross-examination this witness said that he was not sure whether the pole struck the plaintiff, or the chains on it, or the falling glass, but he thought that it was the falling glass. There was nothing to show how long the cart had been out of order or what caused it to be out of order. The defendant did not call the driver as a witness and did not testify himself and introduced no evidence. There was a finding for the plaintiff, and the case is here on exceptions by the defendant to the refusal of the judge to give certain rulings which he requested.

The defendant contends in substance that the accident was caused by the jerking or pulling of the blanket by the bystander, and that he is not liable therefor because the driver had no authority to procure assistance from the bystander. But we think that the act of the bystander must be regarded as the act of the driver. The cart was out of order and the driver was trying to fix it as he was bound to do. For that purpose he asked the bystander to assist him. And in doing so he used the assistance of the bystander as he would have used a tool or appliance which he had procured, and which he must be regarded as having implied authority to procure under the circumstances. The fact that the tool or appliance was an intelligent human being does not affect the matter any more than the fact that another person held the reins did in *Booth* v. *Mister*, 7 C. & P. 66. The case is not one where the servant attempted to delegate his duty to another as in *Gwilliam* v. *Twist*, [1895] 2 Q. B. 84; but a case

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where the driver needed for a moment, in the performance of his duty in a sudden emergency, another hand, and found it in the assistance given at his request by a stranger, and what was done by the stranger was as if done by himself. See *Althorf* v. *Wolfe*, 22 N. Y. 355; *Campbell* v. *Trimble*, 75 Texas, 270; *Bucki* v. *Cone*, 25 Fla. 1; *Pennsylvania Co.* v. *Gallagher*, 40 Ohio St. 637; *James* v. *Muehlebach*, 84 Mo. App. 512.

Moreover the cart was out of order and the defendant offered no explanations as to how long it had been out of order or what caused it to be so. In the absence of such explanation the judge was warranted in finding that the cart would not have been out of order but for the defendant's negligence. And he could also find that its condition was a contributing cause of the accident. *Lane* v. *Atlantic Works*, 107 Mass. 104. In other words, he could find that, if it had not been for the condition of the cart, the action of the bystander in pulling out the blanket would not have caused the body of the cart to fall, as one of the witnesses testified that it did, and the pole to swing round over the sidewalk, thereby striking the plaintiff, or breaking the window so that he was injured by the falling glass. It is not necessary to render the defendant liable that he should have been able to foresee the precise manner in which the accident happened. It is enough if injury to another was reasonably to be apprehended as a result of his negligent conduct. *Lane* v. *Atlantic Works*, *ubi supra*. *Feely* v. *Pearson Cordage Co.* 161 Mass. 426. We see no error in the manner in which the judge dealt with the case.

Exceptions overruled.

STEPHEN JENNINGS *vs.* GEORGE H. LAW.

Suffolk. April 3, 1908. — May 21, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Bills and Notes, Consideration, Validity.

At the trial of an action by the indorsee of a negotiable promissory note against the maker, it appeared that the defendant had signed the note for the accommodation of the payee, from whom by indorsement the plaintiff had received it

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to settle another note likewise indorsed and held by the plaintiff, that, at the time when the defendant signed the note in suit for the payee, the latter was under an indictment which charged him with having uttered the former note, knowing it to have been forged. The payee testified that, upon his indorsing and delivering the note in suit to the plaintiff, the latter gave to him the alleged forged note and he destroyed it, but evidence introduced on behalf of the plaintiff was to the effect that he gave to the payee of the note in suit merely an order on the district attorney for the first note after he should have finished using it in evidence. There was no evidence that the first note actually was forged, nor as to what was the result of the trial of the payee on the indictment, but it did appear that he testified at such trial that he did not know that the first note was forged. The defendant contended that the consideration for the note in suit was illegal, being an agreement to compound a felony. *Held*, that the defense was not made out, since there was no evidence of an agreement to compound a felony.

CONTRACT upon a promissory note of which the defendant was alleged to be the maker, one O. O. Owen the payee, and the plaintiff an indorsee. Writ in the Superior Court for the county of Suffolk dated August 13, 1904.

There was a trial before *Aiken*, C. J. The facts are stated in the opinion. At the close of the evidence, the plaintiff requested rulings (1) that upon all the evidence no legal defense had been shown upon the issue of no consideration or payment; and (2) that upon all the evidence the verdict should be for the plaintiff. The requests were refused, there was a verdict for the defendant, and the plaintiff alleged exceptions.

The case was submitted on briefs.

W. C. Cogswell, for the plaintiff.

F. G. Holcombe, for the defendant.

SHELDON, J. Although it is not expressly stated in the bill of exceptions that it contains all the evidence offered at the trial, yet as both parties in their briefs have assumed this to be the case, we have dealt with the case upon that basis. *Johnson* v. *Kimball*, 172 Mass. 398. *Ready* v. *Pinkham*, 181 Mass. 351.

The substance of the evidence was that the plaintiff had taken from one Owen and held another note upon which Owen was indorser and as such owed to the plaintiff the sum of $400; that Owen was then indicted for having uttered that note, knowing it to have been forged. Under these circumstances the defendant signed the note in suit and gave it to Owen, "to help him out" as he testified, expecting Owen to repay him any sum that he might be required to pay. Owen took this new note to the

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plaintiff, indorsed it, and delivered it to the plaintiff in settlement of the first note. Owen testified that the plaintiff then delivered the first note to him, and he destroyed it. The plaintiff offered evidence that Owen merely took from him an order on the district attorney for the first note after the district attorney should have finished with using it in evidence. There was no evidence whether this first note actually had been forged or not; but there was evidence that at the trial of the criminal case Owen testified that he had no knowledge that it was forged, that he had acted in good faith, and that he "had given the plaintiff a good note [the note in suit] for the forged note."

There was no dispute that the defendant had signed this note for the accommodation of Owen, and that Owen had indorsed it to the plaintiff for value, to settle the first note. Owen was liable on the first note to the plaintiff as indorser thereon; and this liability was the same whether the note was or was not originally a forgery, and whether or not Owen had uttered it knowing it to be a forgery. Under these circumstances, the plaintiff was *prima facie* entitled to recover upon the note in suit against the defendant, its maker. R. L. c. 73, §§ 41, *et seq.*

The defendant has not argued against any of the propositions that have been stated, but rests his defense solely upon the contention that the plaintiff had agreed, if Owen would get the defendant to give the note sued on, to accept the same, and to quash the criminal case pending against Owen, and that it was for this purpose that the defendant made the note, and so that the transaction was unlawful as an agreement for the compounding of a felony. He says in his brief: "The transaction was one forbidden by law, and, the evidence coming to the court from the plaintiff, the court had a right to receive it and instruct the jury to find for the defendant if they believed it." *Cardoze* v. *Swift*, 113 Mass. 250, and cases there cited.

But the difficulty with this contention is that we find no evidence to support it. There was no evidence of any agreement of the plaintiff to quash the criminal case, or of any other unlawful agreement by him. He had a good claim against Owen on the note, and had a perfect right to settle it. Indeed, it appears incidentally that Owen was afterwards tried on the criminal charge, though it does not appear whether he was convicted or

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acquitted. If, as we infer from the argument of the defendant, this was the only ground upon which he rested his defense, we are of opinion that the plaintiff's exceptions must be sustained.

So ordered.

SAMUEL M. ROOSEVELT & others *vs.* GEORGE K. HAMBLIN, administrator, & others.

Suffolk. December 4, 5, 1907. — May 22, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Corporation.

By St. 1855, c. 140, afterwards Pub. Sts. c. 105, § 9, and now R. L. c. 109, § 13, which provides that the persons named in an act of incorporation "and their associate subscribers to stock before the date of the act shall hold the franchise or privileges granted until the corporation is organized," it is necessarily implied that the franchise does not remain in the incorporators as such after the corporation is organized. Where there are no subscribers to the stock before the date of the act of incorporation, the franchise is held by the incorporators named in that act until the corporation is organized, and if such an incorporator refuses to subscribe to the stock and fails to become a stockholder he ceases upon the organization of the corporation to have any interest in its franchise.

Under the statute which now is R. L. c. 109, § 13, which provides that the persons named in an act of incorporation "and their associate subscribers to stock before the date of the act shall hold the franchise or privileges granted until the corporation is organized," a corporation is organized within the meaning of the statute when the first meeting has been called and held, the act of incorporation has been accepted, the officers have been elected and by-laws for future meetings have been adopted, at least where there are any stockholders. It does not matter that at the time of the meeting only a very small part of the stock of the corporation has been subscribed for.

HAMMOND, J. In this suit as it now stands, the plaintiffs, being two of the thirteen incorporators named in the act incorporating the Boston Elevated Railway Company, seek to recover two thirteenths of the sum of $400,000 paid by one Morgan under contracts between him and seven of the other incorporators. Of these seven incorporators three, Hyde, Towle and Patch, are now dead. The defendants comprise the representatives of the Towle and Patch estates respectively, and the other

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four incorporators, making six in all. No representative of Hyde has been made a party to the suit. But inasmuch as he was one of the seven incorporators between whom and Morgan the contracts above named were made, we shall, in describing the transactions, as a matter of convenience include him with the other six defendants above named, and shall use the term "defendants" to describe these original seven. Snow, the other defendant, being made a party for the sole reason that he as trustee holds for the benefit of whom it may concern a part of the money paid by Morgan, will be noticed no further in this opinion.

The case was sent to a master who found the facts and made certain rulings; and finally ruled that the bill should be dismissed. The plaintiffs excepted to the report "on the ground that upon the facts found by the master and stated in the report the master should have ruled that the plaintiffs' bill of complaint can be maintained, and that the plaintiffs are entitled to the relief prayed for as against the incorporator defendants and the funds in the hands of the defendant Snow as trustee." The case is before us upon a reservation by a single justice upon the pleadings, the master's report and the exceptions thereto.

The facts although quite numerous are simple and may be summarized as follows. By St. 1894, c. 548, the Boston Elevated Railway Company was incorporated. There were thirteen incorporators named in the act, of whom the plaintiffs were two and the defendants seven. The manner in which the several incorporators became interested in the enterprise before the passage of the act is set forth in the master's report, and the details need not here be repeated. At a duly notified meeting of the incorporators held on August 8, 1894, at which were present ten of them, including all the parties to this suit except Myers, the act of incorporation was accepted, a code of by-laws was adopted, officers and directors were elected thereunder, and the capital stock was fixed at twenty millions of dollars. Among other things the by-laws provided that the "first board of directors shall be elected by the incorporators and their associates, and thereafter the directors shall be elected by ballot at the annual meeting of the stockholders for the ensuing year, and they shall hold office until their successors are elected. Any vacancy in

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the board may be filled for the unexpired term by the remaining members of the board." The by-laws fixed the second Monday in January in each year as the date of the annual meeting of the corporation, and contained the following provision: "The board of directors or the executive committee as hereinafter provided shall have the management of all the property, business affairs, and interests of the corporation. All the powers of this corporation so far as is consistent with the laws of the Commonwealth of Massachusetts are hereby vested in said board and in said executive committee when said board is not in session." It was voted that the executive committee "be hereby authorized to open a subscription list for the capital stock of the corporation," and that the "board of directors and its executive committee be authorized to enter into contracts in behalf of the corporation for the construction and equipment of its lines of railway." No other business was transacted at this meeting, nor at any time thereafter was any business transacted or vote passed (other than a vote of adjournment) at any meeting of the incorporators as such, although this meeting of August 8 was several times adjourned from day to day until December 14, 1895, when it was adjourned without day. On August 8, 1894, directly after the meeting of the incorporators, the directors held a meeting and elected Whittier president, Towle vice-president, Howland general counsel, Meigs chief engineer, and Towle, Whittier and Hyde executive committee; and voted that the executive committee be authorized to open a subscription list for the capital stock. Thus the corporation was fully organized. The directors adjourned the meeting from time to time, passing various votes not here material, until November 17, 1894, when the meeting was adjourned without day.

Meanwhile the executive committee had held two meetings, one in August, 1894, and one on November 8, 1894. At this last meeting it was voted that the chairman (Towle) be directed to open subscriptions for the capital stock of the company; and the defendants signed a paper of that date by which each subscribed for fifty shares of the stock and agreed to pay the price as the same should be called for by the directors or its executive committee. Upon the facts found by the master we think it must be held that this subscription was accepted by the corpo-

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ration. Nothing ever was paid upon these subscriptions; no call for any payment thereon ever was made either by the directors or the executive committee; nor was any certificate of shares or other acknowledgment ever issued to the subscribers, nor was the subscription paper ever seen by the plaintiffs, nor were the plaintiffs informed of this subscription by any one of the subscribers.

The directors met on December 8, 1894, and, after transacting some business the nature of which is set forth in the master's report, adjourned to January 1, 1895, on which day it was voted that the regular annual meeting of the corporation be called in accordance with the by-laws for Monday, January 14, 1895, for the purpose of electing officers and transacting such other business as might come before the meeting. Notice of this meeting was given by the clerk to all the incorporators and stockholders. Before this annual meeting the plaintiffs resigned as directors under the circumstances stated in the report. Although they attempted to recall their resignations and were present at the meeting, yet a vote was then passed declining to permit the withdrawal of the resignations. They made no further attempt to act as directors, and upon the facts found by the master it is clear that they were no longer directors and that such was the understanding of all concerned. While present at this meeting the plaintiffs heard it described by Towle and at least some of the other defendants, as a stockholders' meeting; and indeed the vote declining to permit the withdrawal of the plaintiffs' resignations shows that stockholders were voting as such and that the question was decided in the negative by a stock vote. This annual meeting was adjourned several times, and it is clear from the facts stated in the master's report that it was regarded as a stockholders' meeting. Indeed, at the adjourned meeting held on March 30, 1895, at which were present six of the defendants, seven directors were elected by a stock vote. The annual meeting then adjourned without day. On March 30, 1895, immediately after the meeting, the directors met, elected officers, and adjourned to December 9, 1895.

At a meeting of the directors of the corporation held on February 6, 1895, the following vote was passed: "Voted that whereas the company is in need of funds and whereas the

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amount of stock offered for subscription, to wit: $500,000 has not yet been subscribed, that the clerk be directed to issue a notice to each of the stockholders and each of the incorporators of this company, notifying them that the books of the company will be open to receive subscriptions to the capital stock until February 16, 1895, and requesting them to forward their subscriptions."

In pursuance of this vote the clerk of the corporation sent to each of the original thirteen incorporators a notice as follows: "Boston, Feb. 8, 1895. Dear Sir: This is to notify you that the books open for subscription to the capital stock of the Boston Elevated Railway Company, will be closed on February 16, 1895, at two o'clock P. M. Subscriptions will be received at any time in room 527 Exchange Building, Boston, Mass. They will be payable in such sums, and at such times as the directors may order. You are earnestly requested to forward your subscription to the undersigned at the earliest possible moment. Fred C. Patch, Clerk."

Neither of the plaintiffs ever subscribed for stock, nor did either see Towle after the annual meeting in Boston on January 14, 1895. There was however some correspondence between them the nature of which is fully set forth in the master's report. The substance of it is that the plaintiffs declined to undertake the "financing of the securities of the company" unless "the whole thing could be turned over to us."

It is unnecessary to recite further in detail the facts set forth in the report as to the state of the corporation in December, 1895, the time at which the contracts with Morgan were made. The charter had been granted and accepted, by-laws had been passed, officers elected and the corporation had been organized. Stock had been subscribed for and the subscriptions had been accepted. Although the amount subscribed was only a very small part of the stock, yet the annual meeting of the stockholders had been held in accordance with the by-laws of the corporation and directors had been elected by a stock vote. The plaintiffs, although requested, had declined to subscribe for the stock. In a word, the corporation had passed through its birth throes and was breathing with its own lungs.

Under these circumstances Morgan appeared upon the scene

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with a desire to get the control of the corporation. Had the stock been all subscribed for or issued he could have got control by the purchase of a majority of the stock. But only a small part had been subscribed for. Where rested the franchise? Was it in the incorporators or in the corporation?

There are various ways in which a corporation may be organized; and of course the relations which the persons specifically named in the statute granting a franchise sustain to the franchise or to the corporation, either before or after its organization, depend largely upon the statute. Sometimes the statute names certain persons who as public officers call for subscriptions to the stock of the corporation and when the whole stock is subscribed call a meeting of the subscribers to organize the corporation, at which meeting the organization is effected by the subscribers. In such a case the persons specifically named in the statute act all the way through as public officers and as such have no interest whatever either in the franchise or in the corporation. A good illustration of such a state of things is to be found in *State* v. *Bull*, 16 Conn. 179.

Sometimes the petitioners for an incorporation have already associated themselves together with others as subscribers to stock, and in the statute the franchise is given to one or more of the petitioners named specifically and their associates. This formerly was a very common way of granting a franchise. Especially in the case of an application for a bank of deposit and discount was it the practice for the applicants to inform the Legislature who were the subscribers in order that it might be seen whether they were proper persons to receive a charter. This practice is alluded to in *Lechmere Bank* v. *Boynton*, 11 Cush. 369. Sometimes, at the time the charter is granted, there are no subscribers for the stock. In such a case the word "associates" may mean those who were associated as petitioners with the persons specifically named in the act. The question as to who were entitled to a franchise and who could organize a corporation was very fully considered in *Lechmere Bank* v. *Boynton, ubi supra*. In that case (decided in 1853) there was a question as to which of two classes of persons were entitled to organize the corporation.

We do not find it necessary to consider further the various

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methods of creating corporations by a special charter and of setting them at work, because we are of opinion that the question of the ownership of the franchise is settled by St. 1855, c. 140, afterward Pub. Sts. c. 105, § 9, now R. L. c. 109, § 18. The statute was passed probably to avoid some such difficulties as were disclosed in *Lechmere Bank* v. *Boynton*, 11 Cush. 369. See *Newcomb* v. *Reed*, 12 Allen, 362, 364. By the terms of that statute the persons named in the act of incorporation "and their associate subscribers to stock before the date of the act shall hold the franchises or privileges granted until the corporation is organized." In the case before us it does not appear that there were any subscribers to the stock before the date of the act of incorporation. The franchise therefore was held by the thirteen incorporators specifically named therein. It is necessarily implied in the act that the franchise does not remain in the incorporators after the corporation is organized; and we are of opinion that within the meaning of this statute and for the transfer of the franchise the corporation must be regarded as organized when the first meeting has been called, the act of incorporation accepted, the officers elected and by-laws providing for future meetings adopted, at least where there are any stockholders. Rev. Sts. c. 44, §§ 3, 5. St. 1855, c. 140. Pub. Sts. c. 105, §§ 9, 12. *Braintree Water Co.* v. *Braintree*, 146 Mass. 482. *McGinty* v. *Athol Reservoir Co.* 155 Mass. 183. Under the circumstances disclosed in this case it must be held therefore that the franchise was in the corporation at the time of the contracts with Morgan. The incorporators as such had no further interest in the franchise or the property of the corporation, and, after the acceptance of stock subscriptions, had no further power in its management. The interests of the corporation including its franchise were the property of the stockholders as such, and were to be cared for by the officers acting as the agents of the corporation and subject to the will of the stockholders; and that was so even if only a very small fractional part of the stock had been subscribed for and accepted, and although no payments had been made thereon, none having been duly called.

When Morgan arrived upon the scene the situation was this. The corporation had been fully organized, so far at least as to

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hold the franchise, the control of which was the thing which he desired to get. The affairs of the corporation were being managed by its officers, holding their respective offices at the will of the stockholders. Each stockholder could dispose of his right to the stock as he saw fit. In this respect he sustained no fiduciary relation to any other stockholder, much less to any incorporator, nor was he under any legal obligation to look out for the interest of any other stockholder or of any incorporator. Moreover in this particular case the plaintiffs had been solicited to become stockholders and after being fully notified of the time in which the subscription books would be closed had failed to subscribe. And this is not all. Although requested so to do, they had declined to make any attempt to finance the securities of the corporation unless they could be put in full control; and after the annual meeting of January 14, 1895, at which they were not permitted to withdraw their respective resignations as directors, they did not attend any meeting of the directors or of the corporation, nor, so far as disclosed by the report, did they have anything further to do with the enterprise. Under these circumstances whether or not the defendants owed them any moral duty is not here material. Certainly there was no legal duty.

In this state of affairs the person who could get the rights of a majority of the stock could control the corporation. Upon an examination of the contracts made with each of the defendants, they being all of the stockholders, it will appear that no one of the defendants undertook to sell anything but his own individual interest. Each transferred to one Baldwin acting for Morgan "all the right, title and interest I have in and to the Boston Elevated Railway Company, either as one of the incorporators or otherwise, and also all stock or right to stock which I have therein, and all claims which I have against said company, of every name and nature." Each also irrevocably appointed Baldwin a representative of Morgan to be his attorney in fact, with full power "to be present at any meeting which may be held of the incorporators of said Boston Elevated Railway Company, and in my name and stead to . . . do and perform any and all acts or things, whatsoever, which I, as one of said incorporators, may or shall have the right to do or perform." As a part of the un-

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derstanding with Morgan each of the defendants subsequently resigned his official position, and the nominees of Morgan were elected to fill vacancies. The defendants also assigned to Morgan all bills they had against the corporation; and two of the defendants, Towle and Whittier, agreed that they would pay or cause to be paid, satisfied and discharged at their own expense, "any claims, indebtedness, contracts or obligations of said company" other than those thus assigned. In a word, these defendants assigned all their respective interests in the company as incorporators or stockholders, all their claims as creditors, and resigned their offices to be filled under the by-laws by the nominees of Morgan. Under the circumstances this gave to Morgan the control of the franchise, just as before the sale the control had been in them. They did not sell any interest possessed by the plaintiffs. In any event the interest of the plaintiffs, if any they had, was not affected in any way whatever. If Morgan had gained the control, he had gained it because he had bought the right to stand in the place of the persons who at the time of the contracts were in control. If after the contracts the plaintiffs were not in control it was not because anything belonging to them had been transferred to Morgan, but because they were not in control at the time the contracts were made. They were in no worse or better condition than before. Their relation to the franchise and to the corporation was in no way changed either in law or equity.

This is not a case where some of several joint owners have undertaken to sell the whole interest in the property held in joint ownership, and where the owners not concerned in the sale can ratify the sale and look to their fraudulent associates for their share. Nor is it a case where promoters bearing a fiduciary relation to the corporation of their own creation attempt to defraud it by conveying to it at an exorbitant price property in which they have an interest adverse to the corporation, as was the situation in *Old Dominion Copper Mining & Smelting Co.* v. *Bigelow*, 188 Mass. 315. Nor is it a case like *Hayward* v. *Leeson*, 176 Mass. 310, where promoters have caused to be issued to themselves a large part of the capital stock for their remuneration in fraud of subsequent stockholders subscribing for the stock in ignorance of that fact.

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There has been no fraud committed upon the corporation. It and all subsequent stockholders stand as before. It is true that bills were made out by Towle against the corporation for a large sum; and it is contended by the plaintiffs that these were made out and assigned to Morgan for the express purpose of defrauding them, but the master finds that this contention is not sustained by the evidence.

The nature of the transaction is well set out in the master's report in the following language: "As to the claim of the plaintiffs that the seven vendors sold and transferred on December 9 and 11, the entire charter of the Boston Elevated Railway Company to Morgan, and that Morgan paid to the vendors the full value of said charter, it is true that Towle, Meigs, and Spaulding, referred at different times to the transaction as a sale of the charter. It was shown, also, that in the spring of 1896 the banker defendants issued a circular to the stockholders of the West End Street Railway Company which contained the statement, 'We bought jointly the Boston Elevated Railway Company charter.' Notwithstanding the fact that the transfers to Morgan were thus described or referred to at different times as a sale of the charter, I find that the real transaction was that the seven vendors, constituting together all the stockholders of the corporation, or, if they were not stockholders, a majority of all the incorporators thereof, and constituting also the entire board of directors of the company, transferred to Morgan all their stock, if stock it was, and all their rights as incorporators, with the result that Morgan acquired all the rights and control which they had collectively, whether that of stockholders or incorporators, together with whatever claims they had against the corporation, and that Morgan paid said consideration for such transfers, together with the resignations of the seven vendors as directors and officers and the substitution of Morgan's nominees as directors and officers to fill the vacancies thus caused. After the arrangement between Morgan and the seven vendors had been consummated the plaintiffs continued to stand in the same legal relation to the corporation, and to possess the same legal rights as incorporators thereof, as before the transfer."

The rulings of the master were correct, and the exceptions to the report are overruled. Under the terms of the reserva-

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tion there must be judgment for the defendants with costs; and it is

So ordered.

R. M. Morse, (*W. P. Everts* with him,) for the plaintiff.

S. K. Hamilton, (*T. Eaton* with him,) for William Spalding.

W. Howland, *pro se*, and for Charles A. Whittier, administrator.

H. N. Allin, for Joe V. Meigs.

BOSTON ELEVATED RAILWAY COMPANY *vs.* ARTHUR B. CHAPIN.

Suffolk. January 13, 1908. — May 22, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Boston Elevated Railway Company.

By § 18 and § 19 of the charter of the Boston Elevated Railway Company, St. 1894, c. 548, a fund of $500,000 was required to be deposited with the treasurer of the Commonwealth. Section 14 of the charter provides that "the Supreme Judicial Court may at any time, on application of said corporation, when it shall satisfy said court that there is no longer occasion for said fund for the purposes of this act, order the said treasurer to pay the same to said corporation or its assigns." That corporation made an application by petition to the Supreme Judicial Court for an order for such repayment of the fund. The case was reserved by a single justice with a report of his findings of fact for determination by the full court. It appeared that all the lines of railway specified in § 19 and amendments thereto had been built, and that the whole of the fund was held under the provision of § 18 which declares that the deposit "shall be in the hands of said treasurer a fund out of which any execution issued pursuant to the provisions of the preceding section shall be paid by said treasurer." The executions referred to are those for damages to abutters by reason of the construction, maintenance and operation of the elevated railway. *Held*, that the court would not assume that the sole cause of the requirement of the deposit was the uncertainty of the success of the enterprise when the charter was granted in 1894, and that its purpose was not to provide security in the future as well as in the past for the damages caused to abutters by the construction and operation of the elevated railway, and the petition was dismissed, with the suggestion that if this construction of the charter was erroneous relief could be had by application to the Legislature.

LORING, J. By the charter of the Boston Elevated Railway Company that corporation had to deposit with the treasurer of

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the Commonwealth the sum of $500,000 "which," in the words of § 13 of that charter (St. 1894, c. 548), "shall be in the hands of said treasurer a fund out of which any execution issued pursuant to the provisions of the preceding section shall be paid by said treasurer."

Executions issued pursuant to the provisions of the preceding section are executions for damages caused to abutters by the construction and operation of the elevated railway.

By § 19 of the charter three hundred thousand of the five hundred thousand dollars was pledged to the Commonwealth (subject to the prior lien for the payment of abutters' damages) to secure the construction of certain lines of tracks in Boston. The provisions of § 19 were amended by St. 1897, c. 500, § 22, and St. 1901, c. 90. The lines of railway specified in § 19 of the charter and in these subsequent acts have been built and the whole fund is now held by the treasurer for the purposes stated in that part of § 13 of the charter which is quoted above.

By § 14 of the charter it is provided that: "The Supreme Judicial Court may at any time, on application of said corporation, when it shall satisfy said court that there is no longer occasion for said fund for the purposes of this act, order the said treasurer to pay the same to said corporation or its assigns."

The petition now before us is a petition under § 14 alleging that there is no longer occasion for the retention of this fund by the treasurer, and asking that he be ordered to pay it to the petitioning corporation.

The case was heard by a single justice and reserved by him for our consideration.

The facts found at the hearing are substantially these.

The petitioner has paid the claims of about ninety-five per cent of the abutters on the original route, amounting approximately to $5,200,000. It also has paid the claims of about sixty-seven per cent of the abutters on the later extension from Guild Street to Forest Hills, amounting approximately to $450,000.

All claims of abutters for damages "have been paid at once whenever the amount has been determined either by an amicable agreement of the parties or by trial, and . . . no exe-

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cutions to enforce the payment of any such claims have ever been issued."

The petitioner on September 30, 1907, had a surplus over and above its capital stock and indebtedness of substantially $4,700,000. Its capital stock is $13,300,000, it has earned and paid dividends at the rate of six per cent per annum for a number of years, and it is now financially able to pay all claims for abutters' damages, and in all probability will be financially able to do so in the future.

In addition to the construction of its original route and the extension to Forest Hills referred to above, the petitioner is now engaged in the construction (1) of an elevated approach to the Washington Street subway (under St. 1902, c. 534) and (2) an extension of its elevated railway to East Cambridge (under St. 1906, c. 520). In addition it is authorized to construct (1) certain additional elevated railways in connection with its route over Cambridge bridge, (by St. 1906, c. 520,) and (2) an extension of its elevated railway from Sullivan Square to Malden and Everett (by St. 1907, c. 497).

The amount of unsettled claims of abutters under the provisions of the act of 1894, on the line of the original route of the railroad, and of the extensions above referred to, "may exceed five hundred thousand dollars."

The counsel for the petitioner is doubtless right in his assertion that when the charter under which the Boston Elevated Railway Company has since been built was granted to Mr. Meigs and his associates in 1894, the success of the enterprise, or rather of any of the enterprises thereby authorized, was uncertain. But we do not feel that we can take action here on the assumption that the uncertainty of the enterprise was the sole foundation of the creation of this fund, and order it to be paid by the treasurer to the petitioner on the ground that for all practical purposes there is now no uncertainty about the financial status of the railway company.

It had long been the established policy of the Commonwealth (when the charter in question was granted in 1894) to require security, if asked for, to be given for the payment of land damages before a railroad could enter upon land taken by eminent domain. St. 1833, c. 187, § 3. St. 1835, c. 148, § 1. Rev. Sts.

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c. 39, § 61. St. 1855, c. 9, § 1. Gen. Sts. c. 63, § 82. St. 1874, c. 372, § 65. Pub. Sts. c. 112, § 97.

More than that, when by St. 1890, c. 368, general authority was given to any railroad or street railway company to "build and use the Meigs system of elevated railway," it was provided in § 2 that this liberty should be subject to the provisions of the Public Statutes as to damages in case of steam railroads (including the section referred to above requiring security to be given if asked for).

We do not feel that we can assume that the Legislature in requiring the creation of this fund of $500,000, did not intend to provide security for the damages caused to abutters by the construction and operation of the elevated railway.

We can hardly accede to the argument of the petitioner's counsel that if this be the true construction of § 13 there was no occasion for the authority given to this court by § 14 to order the same paid over "at any time," on its being satisfied that "there is no longer occasion for said fund."

The possibility of just such extensions as have since been authorized may well have been in the mind of the Legislature. Having in mind such possibilities, and having in mind also that the damages to abutters are caused not all at once but as the construction begins, it may well be that the Legislature thought it fair to the Boston Elevated Railway Company to insert in its charter such a general provision as that set forth in § 14.

If we are wrong in our construction of this charter relief can be readily had upon application to the Legislature.

Petition dismissed.

F. E. Snow, for the petitioner.

D. Malone, Attorney General, & *F. T. Field*, Assistant Attorney General, for the respondent.

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HENRY DOBBINS & others *vs.* FRANCIS H. PEABODY & others.

Suffolk. January 15, 16, 1908. — May 22, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Trust. Corporation. Meigs Elevated Railway Company.

In a suit in equity to establish a trust for the benefit of the plaintiffs in a sum of $400,000 alleged to be the proceeds of a transfer of the charter and control of the Boston Elevated Railway Company, the plaintiffs were stockholders of the Meigs Elevated Railway Company and contended that the stockholders of that company employed two of the persons who afterwards became incorporators of the Boston Elevated Railway Company as their attorneys to procure the incorporation of the last named company, and that such incorporators stood in a fiduciary relation toward the plaintiffs. A master to whom the case was referred found that the incorporators in question were not employed as such attorneys, and that no fiduciary relation existed between the plaintiffs and any of the defendants, but that the incorporators and the other persons who worked to procure the charter of the Boston Elevated Railway Company did so for their own purposes and in no way as representing the interests of the plaintiffs. A single justice confirmed the master's report and dismissed the bill, and on appeal this decree was affirmed by the full court.

Under Pub. Sts. c. 105, § 9, now R. L. c. 109, § 13, the persons who hold the franchise or privileges granted to a corporation by a special charter, until the corporation is organized, are the incorporators named in the act of incorporation "and their associate subscribers to stock before the date of the act," and, if at the date of the act no stock has been subscribed for, the persons named in the act are the only persons in whom the franchise rests before the organization of the corporation.

BILL IN EQUITY filed in the Supreme Judicial Court on September 1, 1899, for the purpose stated in the opinion, where also the decree and appeal are stated.

The case had been referred to Benjamin N. Johnson, Esquire, as master. The portions of the master's report especially referred to in the opinion were as follows:

"As to the claim of the plaintiffs that certain of the stockholders of the Meigs Elevated Railway Company associated together in 1893 or 1894 and employed Towle and Howland as attorneys for the stockholders of said company to obtain this legislation, I find that there was neither such association nor such employment. The plaintiffs, that is, the stockholders of the Meigs Elevated Railway Company, did not employ Towle

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and Howland, or either of them, as their attorneys to secure such legislation, nor did such stockholders take any action, part, or interest in securing the same, except as herein appears. There was, in 1893 and 1894, no relation established between Towle and Howland, or either of them, on the one hand, and the body of stockholders of the Meigs Elevated Railway Company on the other, except that which arose from the relation of Towle and Howland to the Meigs Elevated Railway Company as a corporation, and that relation was clearly determined by the agreement of October 9, 1890. Unless the court shall otherwise construe its provisions, I find that this agreement did not establish the relation of attorney and client, and did not create a trust relation between the parties, as claimed by the plaintiffs. I also find that the actions and statements of Towle and Howland prior to and subsequent to the execution of said agreement, taken in connection with said agreement, did not create any such trust relation. The agreement provided that when 'any corporation organized by Towle and Howland' should be granted the right to use the Meigs system, the Meigs interests were to be paid in the form of stock in such corporation 'a royalty for and in full payment of all claims for royalties for the use of the patents of said Meigs system.' On the other hand, the agreement clearly contemplated that Towle and Howland were to labor at their own risk, both as to their services and disbursements. The only compensation open to them was by way of a possible profit arising from their securing, in any arrangement they might make for the use of the Meigs invention, a larger consideration or allotment of stock than that which they were required by said agreement to turn over to the Meigs interests. Towle and Howland did not obligate themselves to continue such efforts any further than they deemed it for their own interest so to do. Such an arrangement negatives the suggestion of a trust, and was wholly inconsistent with the relation of attorney and client. During the three years ending October 9, 1893, the only relation between Towle and Howland and the Meigs Elevated Railway Company was the contractual one established by said agreement, except that Towle was, or claimed to be, a stockholder in said company. Subsequent to October 9, 1893, the relation was the same as during the previous three years. It

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does not appear that the agreement of October 9, 1890, was extended, or that any notice was given of its termination. No new arrangement or agreement was entered into. Whether the agreement of October 9, 1890, remained in force for all purposes or not, therefore, the relationship of Towle and Howland to the Meigs interests, and therefore to the Meigs Elevated Railway Company, was the same as while said agreement was in full force. It was expected and understood by the Meigs interests that Towle and Howland were devoting their time and energy to the promotion of the Meigs inventions without compensation and at their own risk and for such profit as they might be able to make in securing the use of such inventions by any corporation which they might organize; and it was understood by the Meigs interests that the only way in which they were related to these efforts of Towle and Howland was that they would be entitled to receive royalties, or other similar compensation, for the use of the Meigs inventions, either on the basis fixed by the agreement of October 9, 1890, or on some other basis to be agreed upon in the event that Towle and Howland should succeed in securing the construction of a railroad upon the Meigs system. Such royalties could not be properly payable unless a practical use of that system could be made, or, at least, determined upon, by investing capitalists. It was only in that event that the Meigs interests could realize anything under their patents; and they assumed no responsibility for the efforts or disbursements of Towle and Howland, who, on their part, must succeed, not only in securing a satisfactory charter, but in inducing capitalists to invest money in the building of a railroad upon the Meigs system, in order to enable the Meigs interests to receive their expected profit.

. . . . . .

"In conclusion I find that, there being no trust relation between the plaintiffs and Towle and Howland, and there being no employment by the plaintiffs of Towle and Howland, or either of them, as their attorneys to secure said act of 1894, and Towle and Howland having secured said act and the charter embodied therein as the result of their own labors, and at their own risk, the plaintiffs had no interest either at law or in equity in said act of 1894, and said charter, and that they were not, therefore,

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in any way interested in the proceeds of the sale thereof to Morgan.

"The plaintiffs requested me to find that Towle was the personal counsel of Meigs during the legislation of 1894 and in obtaining that legislation, but I do not so find. Evidence was introduced by the plaintiffs, in the form of statements by Meigs and otherwise, tending to show such a relation on the part of Towle to Meigs, or at least that Meigs so considered the relation, but upon all the evidence I find that Towle was acting on his own account in securing the legislation of 1894, and that while he did not appear openly as a petitioner, he in fact had the interest of a petitioner in the proposed legislation. It is true that Meigs looked to Towle to protect his interests, and frequently referred to Towle as his attorney, and that he trusted him in all legal matters in the same way that a client would trust his attorney, but Meigs nevertheless understood that in striving for the legislation Towle was working with him and not for him.

"The plaintiffs also requested me to find that the defendant Howland was the legislative counsel of Meigs with reference to securing said legislation, and that he filed his appearance as such on the docket of legislative counsel at the state house in 1894. I find that Howland did so file his appearance, but that the purpose of filing the same was to enable Howland to appear without question before the appropriate committees in behalf of the petition without disclosing the fact that he was in fact jointly interested as a petitioner.

"As to the relation of the plaintiffs to the defendant Meigs, I find that the action of Meigs in conjunction with Towle and Howland in securing the act of 1894 was prompted by his own interests, and that he was not so related to the plaintiffs that he was bound to hold the result of his efforts in trust for the plaintiffs so far as they related to the procurement of said act and the disposition of said charter. He was one of the largest equitable owners in the patents, and was therefore greatly interested in having his invention introduced into actual use. Besides this, he had an especial pride in his system, and having devoted twenty years to its development and exposition, it was one of the objects of his life to see it put into practical use. It is true that it was

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for the possible advantage of those owning an interest in the Meigs inventions that Meigs should assist Towle and Howland in all their efforts to secure the construction of a road upon his system. He, more than any one else, stood for and believed in that system and was best able to expound it, but he also, so far as the plaintiffs were concerned, labored on his own initiative and at his own risk. Had he succeeded in demonstrating to capitalists the value of the Meigs system the patent owners and those associated with them might have profited by such demonstration. In this, however, he did not succeed, although I find that it was his purpose and intention throughout his action in this matter to secure the adoption of the Meigs system, and that he, in good faith, made every effort in that direction.

"Towle and Howland requested his help in what they were seeking to accomplish, and Meigs appears to have had an agreement with Towle at one time that he should share with Towle in any profits which might be made in the enterprise. Meigs accordingly assisted Towle and Howland in securing the act of 1894, and when the control of the charter embodied therein was turned over to Morgan in 1895, Meigs joined in effecting the transfer. I find, however, that Meigs did not understand, at the time of the transfer to Morgan, that such transfer meant an abandonment of the Meigs system, this fact not having been communicated to him.

"As to all the incorporator defendants, I find that it was understood by them, and intended by the Legislature, that those who were named in said act as incorporators of said Boston Elevated Railway Company should be such incorporators in their own right, and not as representing the plaintiffs or any other persons, and that they, the incorporator defendants, had no knowledge of any interest on the part of the plaintiffs or the stockholders of the Meigs Elevated Railway Company, other than their supposed interest in the Meigs inventions and the right to compensation for the use of such inventions, when, as was at first intended, the road should be built upon the Meigs system.

"As to the claim of the plaintiffs that they were associate incorporators under the act of 1894, I find that, being neither named in said act nor being associate subscribers to stock in said corporation before the date of said act, they had no stand-

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ing as incorporators, and had no interest as such in the franchises and privileges granted to said corporation. I find, also, that the Legislature had no intention to make the plaintiffs associate incorporators in the Boston Elevated Railway Company.

"I therefore find that the incorporators of the Boston Elevated Railway Company who were named as such in said act took and held the charter thereof in their own right, and that the plaintiffs have established no claim thereto or to the proceeds of the transfer of the control thereof."

The following is a copy of agreement of October 9, 1890, referred to in the master's reports and in the opinion:

"Memorandum of Agreement made and concluded this ninth day of October A. D., 1890, by and between the Meigs Elevated Railroad Company the Meigs Elevated Railway Construction Company, all of said Boston, and James L. Meigs trustee of the Meigs patents, parties of the first part, and George H. Towle and Willard Howland parties of the second part,

"Witnesseth

"That for and in consideration of one dollar and the covenants and agreements of each party with the other the parties of the second part covenant and agree that of all the capital stock of any corporation organized by them to operate a railroad in the Commonwealth of Massachusetts under the Meigs system or in accordance with any part of said system there shall be issued and delivered to the order of the parties of the first part in writing an amount of such stock equal to twenty-five per cent. thereof, within ninety days after said corporation or either of them shall be organized or any stock thereof issued, and that the stock so delivered shall be fully paid up and non-assessable, which said stock shall be received by the parties of the first part for and in full payment of all claims for royalties for the use of the patents of said Meigs system and for its use, construction and operation within said Commonwealth. Provided However, that no stock or other compensation for such royalties shall be paid for or on account of the first five miles of said road constructed and operated by said parties of the second part within the territory of Massachusetts.

"And it is further covenanted and agreed by and between

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said parties that said party of the second part may make, build, maintain, equip and operate the Meigs system of said Elevated Railroads as the same now is or may hereafter at any time be secured by letters patent to said Meigs or his assigns or any person for his benefit or use for improvements thereon within said territory of the Commonwealth of Massachusetts provided said first five miles shall be equipped and put in operation within three years from the date hereof, which said provision is part of the consideration and the condition of this contract.

"Provided that this agreement shall be an exclusive license from said parties of the first part or any license thereof for building, maintaining or operating of any railroad within said limits for said three years, and if duly performed for the life-time of said patents.

"And it is further covenanted and agreed between said parties for the consideration aforesaid that said party of the second part are licensed to construct build and operate a railroad or railroads upon said system in any part of the United States other than the State of Massachusetts upon the same terms and conditions save as to building the first five miles, provided that the party of the first part may grant a license to any person or corporation to build said railroads according to said system outside of the State of Massachusetts, but in such case the parties of the second part shall have the right to build, maintain and operate said system upon the same terms and conditions as such license shall be given to the parties so licensed to build a railroad under said system in any other part of the United States.

"And said parties further covenant and agree for the consideration aforesaid that any railroad made and operated under said Meigs system with its rolling stock and appurtenances may be established and used within said territorial limit of the State of Massachusetts by a railroad or railroads built from a point beyond said territorial limits of Massachusetts and running into such termini within said limits as said party of the first part will authorize and license so to do, but that said railroad shall not take up or deliver or set down any passenger or freight at any point or station within said territorial limits except at such terminal depots as said railway so established may set up. But such railroad or railroads shall not be located either in their

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course or in their terminal depots as to obstruct or hinder the construction or operation of said Meigs Elevated Railroad within said territory of Massachusetts.

"And it is further covenanted and agreed between said parties that whenever any said parties are mentioned in this agreement the agreement shall read and be construed and read as if the words "or their legal representatives or assigns" had been written therein after the name of either of said parties.

"Witness the hands and seals of each of said parties of the first part and said parties of the second part respectively the day and year first above written.

"Meigs Elevated Railway Co.
By Joseph H. O'Neil,
President [Seal]
Noah A. Plympton,
Treasurer [Seal]
Willard Howland [Seal]
Geo. H. Towle [Seal]
James L. Meigs,
Trustee [Seal]
Meigs Elevated Construction Co.
By Benj. F. Butler,
President [Seal]
Wm. S. Butler,
Treasurer." [Seal]

Here followed the names of witnesses to the several signatures.

A. Lincoln, (*H. W. Ogden* with him,) for the plaintiffs.

H. N. Allin, for Joe V. Meigs.

W. Howland, *pro se*, and for Charles A. Whittier and others, administrators.

W. A. Gaston, *F. E. Snow* & *R. M. Saltonstall*, for Kidder, Peabody and Company, submitted a brief.

S. K. Hamilton, for William Spalding, was stopped by the court.

HAMMOND, J. This is a bill to establish and enforce a trust in favor of the plaintiffs as stockholders in the Meigs Elevated Railway Company, in the sum of $400,000, that amount being

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alleged to be the proceeds of a transfer of the charter or control of the Boston Elevated Railway Company. The case was referred to a master, and is before us upon an appeal from a decree that the plaintiffs' exceptions to the master's report be overruled, that the report be confirmed and that the bill be dismissed with costs.

As stated in their brief, "The substance of the plaintiff's claim is that they were associated with the incorporator defendants, and more especially with Meigs, Towle, and Howland, in a common undertaking, to wit, to develop, finance, and bring into practical operation the Meigs system of elevated railways, in which the plaintiffs especially had been interested for a long term of years," and that "Out of the fact of this association for a common object . . . there springs a fiduciary relationship and a duty of fidelity to one another which requires each one to account for benefits and advantages received in the prosecution of that object."

There can be no doubt on the facts found by the master that the plaintiffs were interested in the success of the Meigs system and that they, as well as the defendants, worked for its success, but it by no means necessarily follows that the relations between the plaintiffs and the defendants or either of them were of a fiduciary nature. The contention of the plaintiffs that Towle and Howland were employed by certain of the stockholders of the Meigs Elevated Railway Company to obtain the legislation of 1894, by which the charter was granted to the Boston Elevated Railway Company, is negatived by the master, who has found that there was no employment. For the reasons stated by the master we agree with him that the agreement of October 9, 1890, did not as matter of law establish the relation of attorney and client between the parties thereto. True it was an agreement looking to the accomplishment of an end desired by all parties thereto, but neither party was to act as the agent of the other and each stood at arm's length from the other. The finding of the master that no trust relation was created by that agreement or by the acts and statements of Towle and Howland before and after the execution of it, taken in connection with it, is not inconsistent with the other facts and must stand.

Upon the general question whether for any purpose and to

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any extent there was a trust relation between the plaintiffs and any of the defendants, the master has made an exhaustive statement of the facts and circumstances; and without going further into detail it is sufficient to say that for reasons stated by him in his report we are of opinion that his general finding to the effect that no such relation existed is amply warranted by the subsidiary material facts upon which he bases it, and that no error appears in his rulings as to the law. The allegations of the bill as to the existence of a fiduciary relation either as attorney and client or otherwise, are not sustained.

It is urged further by the plaintiffs that within the meaning of Pub. Sts. c. 105, § 9, they were associates of the incorporators, but that position is untenable. The plaintiffs were not named specifically in the act, nor had they subscribed to the stock before the date of the act of incorporation, nor had there been any subscribers to the stock before that date. The persons therein specifically named were therefore, by the plain terms of the statute, (Pub. Sts. c. 105, § 9,) the only persons in whom the franchise rested before the organization of the corporation. *Lechmere Bank* v. *Boynton*, 11 Cush. 369. *Roosevelt* v. *Hamblin*, *ante*, 127.

Hence the general finding of the master that "the incorporators of the Boston Elevated Railway Company who were named as such in said act took and held the charter thereof in their own right, and that the plaintiffs have established no claim thereto or to the proceeds of the transfer of the control thereof," must stand. As this disposes of the plaintiffs' case it becomes unnecessary to consider the other grounds of defense; and the exceptions to the master's report, so far as they relate thereto, become immaterial. The result is that the decree must be affirmed.

Bill dismissed with costs.

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CHARLES H. THURSTON *vs.* FRANK H. HAMBLIN & others.

Suffolk. March 16, 1908. — May 22, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Net Profits. Contract, Construction. *Equity Jurisdiction*, For an accounting. *Interest. Words*, "Net profits."

The net profits of an enterprise consist of the clear gain of the venture after deducting from the net value of all assets on hand the capital invested in the business and all outstanding liabilities.

In a suit in equity by the inventor and patentee of a certain kind of hooks against the manufacturers of the hooks, for an accounting under a contract in writing between the plaintiff and the defendants, by which the plaintiff gave to the defendants the exclusive right to manufacture and sell the hooks and the defendants agreed to employ the plaintiff and pay him $20 a week during the continuance of the agreement, the contract provided that the defendants should pay to the plaintiff "one half of the net profits realized from the manufacture and sale of said improved wardrobe and other hooks made under this agreement, said profits to be computed and paid quarterly during the months of January, April, July and October in each year." *Held*, that under this agreement the plaintiff was not entitled to one half of the net profits of any one quarter considered by itself regardless of whatever losses might have been sustained in previous quarters, but that at the end of each successive quarter the plaintiff was entitled to one half of any net profits of the whole enterprise down to that time that then remain undivided, and that, if at the end of any quarter there were such net profits to be divided, the plaintiff's right to one half of such net profits vested and his share then realized was not to be cut down or diminished by any subsequent losses.

In a suit by the inventor and patentee of a certain article against the manufacturers of the article, for an accounting under a contract in writing between the plaintiff and the defendants, by which the plaintiff gave to the defendants the exclusive right to manufacture and sell the article and the defendants agreed to employ the plaintiff and pay him $20 a week during the continuance of the agreement, and also agreed to pay to the plaintiff one half the net profits realized from the manufacture and sale of the article, to be computed and paid quarterly, the defendants are not entitled to charge interest upon the amount of money advanced by them in carrying on the business.

BILL IN EQUITY, inserted in a common law writ of the Superior Court dated July 10, 1900, against Frank H. Hamblin, William T. Russell and the Hamblin and Russell Manufacturing Company, a corporation, for an accounting for one half the net profits realized from the manufacture and sale by the defendants of certain improved wardrobe and other hooks invented and patented by the plaintiff under the terms of an

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agreement in writing between the plaintiff and the defendants Hamblin and Russell dated October 31, 1887.

The contract referred to was as follows:

"This agreement made the Thirty-first day of October 1887 between Charles H. Thurston now of Boston in the County of Suffolk and State of Massachusetts, party of the first part, and Frank H. Hamblin and William T. Russell doing business in the City of Worcester and State aforesaid, parties of the second part

"Witnesseth:

"That whereas the said party of the first part owns the exclusive right to manufacture improved wardrobe and other hooks, under letters patent of the United States dated October 11th 1875 and numbered 168,682, and October 7th 1884 numbered 306,294, and

"Whereas said party of the first part has applied for other letters patent of the United States for certain improvements in wire suspension hooks said improvements relating to a direct brace and 'hollow hemispherical or concave-convex enlargement' which application is now pending.

"Now therefore the said parties have agreed as follows: First the party of the first part hereby gives to the parties of the second part, their legal representatives, the sole and exclusive right to manufacture and sell to the ends of the terms of the letters patent aforesaid, also to the end of the term of the letters patent, if granted, application for which is now pending, as before specified, wardrobe and other hooks containing the patented and to be patented improvements, subject to the conditions hereinafter named.

"Second. The parties of the second part agree to employ the party of the first part and to pay him at the rate of not exceeding twenty dollars per week during the continuance of this agreement.

"Third. The parties of the second part agree to furnish the capital necessary to build six threaders and the requisite number of benders for making said improved hooks and to supply the material and labor required in commencing the business.

"Fourth. The parties of the second part agree to pay to the party of the first part his legal representatives one half of the

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net profits realized from the manufacture and sale of said improved wardrobe and other hooks made under this agreement, said profits to be computed and paid quarterly during the months of January, April, July and October of each year.

"Fifth. The said parties of the second part agree to keep separate books of account, and expenses of manufacture and sale of said improved hooks, *including all expenses of the business*, which books shall be at all reasonable times open for the inspection of said party of the first part and his legal representatives.

"Sixth. In case the said parties of the second part desire to discontinue the manufacture and sale of the improved hooks herein contemplated, they may at their option terminate this agreement by paying to the said party of the first part whatever may be due him at the time as wages for his services and by reconveying to him whatever rights are held by them by virtue hereof.

"Seventh. The party of the first part agrees to execute and deliver to the parties of the second part any further instrument or instruments in writing deemed by them necessary to enable them to hold and to enjoy the exclusive right to manufacture and sell said improved hooks under the letters patent herein named and applied for according to the true intent and meaning of these presents.

"In Witness Whereof the said parties have hereunto set their hands and seals the day and year first above written.

"Frank H. Hamblin (Seal)
W. T. Russell (Seal)
Chas. H. Thurston" (Seal)

The case was referred to Stephen H. Tyng, Esquire, as master. He filed a report in which he found that the defendants Hamblin and Russell owed the plaintiff $11,584.65.

In the Superior Court the case was heard upon the defendants' exceptions to the master's report by *Fox*, J., who filed the following memorandum of decision:

"Oct. 31, 1887, the plaintiff, an inventor, made an agreement with the defendants who are manufacturers, under which the defendants were to manufacture and sell the plaintiff's patented articles and give him half the profits arising from the manufac-

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ture and sale. The clause relating to the division of profits is as follows: 'Fourth. The parties of the second part agree to pay to the party of the first part one-half of the net profits realized from the manufacture and sale of said improved wardrobe and other hooks made under this agreement; said profits to be computed and paid quarterly during the months of January, April, July and October of each year.' This agreement remained in force from 1887 to 1900. During all this time the plaintiff was in the defendants' employ, drawing $20 a week as wages, but there was never any estimation or division of the profits, the defendants contending that none were earned. The master on page 12 of his report says that it is impossible for him to determine whether for the entire period the business was run at a loss or not. In spite of this declaration he awards to the plaintiff $11,534.65 as his share of the profits with interest earned during this period. I am unable to accept this conclusion for several reasons.

"1. The master apparently proceeds upon the assumption that if the business for any single quarter was profitable, the plaintiff was entitled to a share of the profit of that quarter, even though that profit did not make good the losses of the preceding quarters. For example, if the business lost $500 in each of the first three quarters of the year and gained $500 in the last quarter, the plaintiff was entitled to have $250 as his share of the profit for that quarter, and leave the defendants to bear the entire loss of $1,500. I am of the opinion that the plaintiff was not entitled to any share of the profit until the business showed a profit, and that it could not show a profit until it showed a surplus above the investment. It may be true that the plaintiff's right to a profit once earned could not be cut down by subsequent losses, but it does not appear that there was any time during the entire thirteen years when the receipts and stock and machinery on hand exceeded the outlay.

"2. The master finds that there was a profit in sixteen quarters, scattered through the thirteen years, and he rests this finding upon an account submitted by the defendants' experts and annexed to his report, 'Exhibit A.' This has a column of expenses by quarters and a column of sales by quarters. In any quarter in which the sales exceed the expenses that excess

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is put down in a third column marked 'Surplus,' and whenever the expenses exceed the sales, that excess is put in a column headed 'Deficit.' The account, therefore, simply shows that during certain quarters the receipts exceeded the expenses, and during other quarters the expenses exceeded the receipts. For example, for the quarter ending Jan. 1, 1889, the receipts were $1,229.37 and were $549 less than the expenditures. For the quarter ending April 1, 1889, the receipts were $2,536.04 and exceeded the expenditures by $216.53. The only natural inference from these figures is that goods were manufactured in one quarter and sold in the next. It would clearly be impossible from this account to infer either that the concern lost money in one quarter or made it in the next quarter. No estimate of profits could be made without at least a stock-taking, and the report shows there was no stock-taking from the beginning to the end of the business.

"3. The master finds that there was on hand at the close of the business machinery, tools and stock to the value of $8,994.95. From this sum he deducts $3,000 as capital advanced by the defendants, and finds that the plaintiff is entitled to one-half the remainder or $2,997.47, and this sum he includes in his award in the plaintiff's favor. There is no evidence that the plaintiff ever put any money into the business, and there is no theory upon which the plaintiff can be entitled to a division of the property on hand at the close of the business unless that property represents undivided profits. In view of the statement of the master already referred to, that he is unable to say whether the business was run at a loss or not, even when the inventory is taken into account, it is difficult to see on what ground this award was made.

"The master, however, is right in holding that the defendants are not entitled to charge interest upon the capital advanced by them in carrying on the business. See *Rishton* v. *Grissell*, L. R. 5 Eq. 326. Apparently, even upon the account submitted by the defendants and annexed to the master's report, if interest be deducted and if the inventory be taken into account (as it should be) a surplus would be shown, and although the exceptions to the master's report, so far as they are covered by the foregoing memorandum, must be sustained, the case will be retained in

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order that the plaintiff may if he desires file a motion for the reopening of the case.

"The question whether the plaintiff is entitled to interest on profits need not be considered until it appears that there was a profit. The plaintiff, however, made no demand for an account until 1899. He had access to the books and knew that there had never been any stock-taking; that the books contained simply an account of moneys received and expended and no sufficient data for estimating the profit, if there was any. If upon recasting the account a profit is shown, it seems that interest upon that profit should be computed from 1900. *Rishton* v. *Grissell*, L. R. 10 Eq. 393.

"The fourth, sixth and eleventh of the defendants' exceptions are sustained. The rest are overruled except as above indicated."

The judge made a final decree that the master's report be confirmed except as appeared by the memorandum filed in the case; that upon the facts found by the master it did not appear that the plaintiff was entitled to recover any sum of money from the defendants, and, since the plaintiff had filed no motion for a reopening of the case pursuant to leave granted, that the bill be dismissed. From this decree the plaintiff appealed.

The defendants' fourth, sixth and eleventh exceptions to the master's report sustained by the judge were as follows:

"4. (Based on objection numbered 4.) The defendants except to the ruling, because under the contract there could be no 'net profits' in any quarter until the expenses of that quarter and the unpaid debts of the business fot previous quarters were paid."

["Fourth: The defendants object to the last paragraph . . . as it is an erroneous construction of clause 4 of the contract, if the master intended to rule that the business of each quarter should be considered apart and distinct from the business of every other quarter and that 'at the expiration of each quarter when there was a profit the plaintiff became immediately entitled to one half thereof, and that his right thereto would not be divested by reason of any losses accruing in any' quarter or quarters immediately preceding that particular quarter, because 'net profits' mean the clear gains of the business as a whole up

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to that time when a computation is made to ascertain its condition, that is, there could be no 'net profits' until the debts of the business had been paid or the deficit of the immediate preceding quarter or quarters had been wiped out."]

"6. (Based on objection numbered 7.) The defendants except to the finding, as erroneous, because the old ledger does not show a single instance of a quarterly accounting such as adopted by the master, but it does show that in every quarter where a balance was struck, there was also taken into consideration the balance whether debit or credit, of the immediately preceding period."

["Seventh: The defendants object to the first sentence of the last paragraph on page 5, 'I find that there was no such abandonment of quarterly accounting in the books of the company as to justify the finding that the parties adopted another or annual scheme in lieu thereof,' as plainly wrong, if the master meant by the words 'quarterly accounting' such a method of accounting as he has adopted, for no such quarterly accountings are shown of the books, but on the other hand they do show that whatever quarterly balances were struck, that balance was carried forward into the next succeeding period and taken into account therein."]

"11. (Based on objection numbered 12.) The defendants except to the statement that 'the tabulation of the defendants' expert shows profits in certain quarters,' because the tabulation does not show any profits but only that the sales of goods made during certain quarters, regardless of when they were manufactured, exceeded the expenses of those quarters, thereby resulting in surpluses which were applied to the cancellation of the due and unpaid debts of the business."

["Twelfth: The defendants object to the finding, 'In said account rendered by defendants' expert profits are shown in sixteen of the quarters accruing during the period from November 1, 1887 to January 1st, 1900. These profits aggregated $7,879.73," as the account rendered by the defendants' expert does not show any 'net profits' in any quarter, but simply that the sales of goods made during that quarter, regardless of when they were manufactured, exceeded the expenses of that quarter, thereby resulting in surpluses in certain quarters."]

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C. C. Mellen, (*H. E. Fales* with him,) for the plaintiff.

M. H. Browne, (*J. M. Browne* with him,) for the defendants.

SHELDON, J. The first question in this case is raised upon the plaintiff's claim that he was entitled to one half of the profits that might be made in any one quarter regardless of whatever losses might have been sustained in previous quarters. The result of this contention, if sustained, would be that if, after an unbroken series of losses sustained throughout many successive quarters, some profits finally should be realized in any one quarter considered by itself, he would become at once entitled to receive one half of such profits as a net gain, while the defendants would have to apply their share in the profits of such special quarter towards reimbursing themselves for their previous losses. The manifest result of this construction under any probable state of affairs would be to give to the plaintiff a much larger share of the profits than would be received by the defendants, and in the events that have happened might give the plaintiff a large profit and leave the defendants to bear a large loss. The agreement cannot be so construed. The words "net profits" in the fourth clause of the agreement relied on, "to be computed and paid quarterly . . . in each year," must be taken in the ordinary acceptation of those words, to mean whatever net profits have then accrued from the business since its beginning, or since the last division of such net profits. These net profits would be substantially represented at any one time by the amount of the receipts from the business, the sums due for goods sold, and the value of stock, materials, tools and plant on hand, less the amount of the investment, of payments made or liabilities incurred for expenses, and any losses sustained by reason of bad debts or otherwise. In other words, they would be what should remain as the clear gain of the venture, after deducting from the net value of all assets on hand the capital invested in the business and all outstanding liabilities. *Park* v. *Grant Locomotive Works*, 13 Stew. (N. J.) 114, 121. It is to one half of these net profits computed at the end of each successive quarter that the plaintiff is entitled. And as the plaintiff's right to this amount would become vested at the end of each quarter when, so reckoned, there were any net profits to be divided, and the amount so due to him should have been paid to him at once, it follows that his

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share of any net profits once realized, is not to be cut down or diminished by the amount of any subsequent losses. This was the doctrine of *Hitchings* v. *Ellis*, 12 Gray, 449. Accordingly the defendants' fourth and sixth exceptions to the master's report were properly sustained.

But it may be that the defendants' eleventh exception should not have been sustained. It is true that the defendants' tabulation did not show actual profits in any quarter, or anything more than that the sales of goods in certain quarters exceeded the expenses of those quarters. But the defendants' books had been ill kept, and were found to be erroneous and not wholly trustworthy, and did not furnish sufficient data for ascertaining the true state of the accounts. They do not appear to have indicated the value of the stock or plant on hand at the end of the respective quarters. It may be that they included, at any rate the master might have found that they included, in the column headed "Expenses" the amounts ($3,000 in all) advanced by the defendants as capital of the business. But this table, incomplete and somewhat inaccurate as it was, was presented by the defendants as a statement of the whole result of the business. It was the evidence upon which they largely relied to sustain their contention that the expenses of the business had exceeded its receipts, and so that there were no net profits. *Wisconsin Sulphite Fibre Co.* v. *D. K. Jeffris Lumber Co.* 132 Wis. 1. As against them, and in view of the fact that the table which they put in evidence did not purport to measure the success of the business and to determine the time when, if ever, it should be considered that net profits had been realized or to ascertain the amount of such net profits in any other way than by comparing expenses with receipts, we are of opinion that the master was warranted in finding that the tabulation of the defendants' expert did show profits in certain quarters, if, after correcting the statement of the expenses by making proper deductions for interest erroneously charged, he found that there were any quarters in which the receipts were greater than the amount of the expenses of that month and the deficits of the preceding months. Whether this should be found, depended upon a calculation which we have not, upon the master's report, the means of making.

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We agree with the ruling of the Superior Court that the defendants were not entitled to charge interest upon the amount advanced by them in carrying on the business. *Rishton* v. *Grisell*, L. R. 5 Eq. 326.

We are inclined to the opinion, upon the facts which are stated in the master's report and the tables which are annexed to it, that a full statement of the account as rendered by the defendants, with proper corrections for the charges of interest made by them and with the correction that would be further required if it should turn out upon fuller investigation that the sum of $3,000 advanced by the defendants for capital of the business had been included in the tabulation of expenses put in by them and so should not again be charged in the final statement of the account, might show a small balance in favor of the plaintiff. We have not however before us sufficient data for determining these questions. Ordinarily, under such circumstances the case would be recommitted to the master to state the proper account. But the defendants do not desire this; and as the plaintiff has failed to avail himself of the permission given to him by the Superior Court to ask to have this course adopted, we must infer that he also does not desire it. It cannot be said to appear now that the plaintiff is entitled to recover anything from the defendants; and the decree of the Superior Court must be affirmed.

So ordered.

WILLIAM K. OTIS *vs.* ESTHER B. FREEMAN.

Norfolk. March 16, 1908. — May 22, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Equity Pleading and Practice, Amendment. *Equity Jurisdiction*, Court will not aid to establish title acquired for unlawful purpose.

A bill in equity, by a married man against a single woman, sought to establish the plaintiff's title to household furniture used in an apartment in which the plaintiff and the defendant had been living together, and a stipulation was made by the counsel for both parties that the title to the property should be tried in the suit. A master to whom the case was referred found for the defendant upon the issue of the title to the furniture. After this finding against him the plaintiff moved for leave to amend his bill by alleging a debt from the defendant to the plaintiff, and seeking under R. L. c. 159, § 8, cl. 7, to reach the furniture as the property

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of the defendant. The judge who heard the case denied the motion. *Held*, that, even apart from the fact that the property, so far as it was not exempt from attachment, apparently could have been reached at law, the motion to amend was denied rightly.

In a suit in equity by a married man against a single woman to establish the plaintiff's title to household furniture used in an apartment in which the plaintiff and the defendant had been living together, if it is found by a master, on evidence not reported, that the defendant bought the furniture with money supplied to her by the plaintiff for the purpose of inducing her to become and remain his mistress and that she did so become and remain, and that the furniture so bought was not bought or used for any lawful purpose but was intended and used by the parties to surround and guard their intercourse with a setting of safety, seclusion and ease, the court will not consider whether the plaintiff has any title to the furniture, as, even if he has, the court will not aid him to secure the title to or possession of property which was a part of the price of such unlawful conduct, but will leave the parties in the position in which they have placed themselves.

BILL IN EQUITY, filed in the Superior Court on August 7, 1905, to restrain the defendant from removing articles of household furniture, alleged to belong to the plaintiff, from an apartment on Beacon Street in the town of Brookline, and from selling, assigning or disposing of such articles.

The answer denied the plaintiff's title to the property, and alleged that the counsel for both parties had agreed that the title to the property should be tried in this suit. The case was referred to Wade Keyes, Esquire, as master. He found that the stipulation alleged in the answer had been made by the counsel for the parties. Among other findings contained in his report were the following:

"I find that the defendant was the mistress of the plaintiff, and that while this relationship existed she was dependent upon him for her living and her pleasure, and received from him money whenever she asked for it, regardless of how she expended it, and whether he approved or did not approve of her expenditures, and that he furnished her a living and money for the purpose of preserving their illicit relations, and for no other purpose whatever."

"I find that the plaintiff fails in his proof to show any contemporaneous agreement between himself and the defendant as to the ownership of the furniture bought by her with money which she received from him.

"I find upon all the facts in this case that the plaintiff, a married man, voluntarily supplied money to the defendant, a single

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woman, in the manner he did, for the purpose of inducing her to become and remain his mistress; and I rule that all the money thus supplied her by him during their relationship when it left his hands, so far as he is concerned, is gone, and becomes in her hands an irrevocable gift, leaving in him no right or title to it, or its proceeds, which a court of equity may recognize or enforce.

"I find that the title to the property in issue appeared to be in the defendant at the time of its purchase, and I rule that there is nothing disclosed by the facts in this case to warrant a court of equity in divesting her of it.

"From all the foregoing facts and rulings I find for the defendant upon the issue of title to the furniture."

In the Superior Court the case was heard by *De Courcy*, J. The plaintiff moved for leave to amend his bill by adding allegations that the defendant owed him $750 for money lent, with interest from November 1, 1905, when he demanded payment, and that the defendant claimed "to be owner, and to have an interest in" the furniture which was the subject of the suit, and by adding prayers that the plaintiff's debt might be established, that execution might issue therefor, and that an injunction might issue restraining the defendant from assigning, selling or conveying the property until the further order of the court. The judge denied the motion to amend, and the plaintiff appealed.

The judge made a final decree overruling the plaintiff's exceptions to the master's report, confirming the report, and ordering that the bill be dismissed with costs. The plaintiff appealed.

W. F. Porter, for the plaintiff.

A. E. Burr, for the defendant.

SHELDON, J. 1. The plaintiff's motion to amend his bill was denied by the Superior Court, and he has appealed from that order. It would be a strange thing if, after bringing his bill for the purpose of establishing his title to and right of possession of the household furniture mentioned, and after obtaining an agreement of the parties that the title to the property should be tried in this action, he could at the same time and in the same bill seek to reach that furniture as the property of the defendant under the provisions of R. L. c. 159, § 8, cl. 7. Apart from the fact that this property, so far as it was not exempt from attach-

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ment, apparently could have been reached at law, this liberty was rightly refused to the plaintiff.

2. It is difficult to see how upon the facts found by the master it could be said that the title to the furniture was in the plaintiff. The money with which the defendant bought it from time to time was a part of what he gave to her. None of this money was furnished to her by him for the specific purpose of buying furniture for his benefit. All the money which she expended for furniture the master has found was furnished to her by the plaintiff precisely as the money which she expended for other things was furnished to her by him, — upon her asking for it, though without any express understanding or agreement between the parties as to whether it was a gift or a bailment; and the plaintiff admits that the other money which he furnished to her, except certain specific loans, was really a gift to her. Under these circumstances, it is not easy to see how he was harmed by any of the rulings of the master, or how any of his exceptions can be sustained.

But we do not deem it necessary to pass upon this question. The master has found, and as the evidence has not been reported this finding is conclusive, that the money supplied by the plaintiff to the defendant was for the purpose of inducing her to become and remain his mistress; and that she did so become and remain. This includes the money with which the furniture was bought and paid for. And the furniture itself, bought with the money furnished for this unlawful end, was not bought for or used with any lawful purpose, but was merely designed and used by the parties to surround and guard their intercourse with a setting of safety, seclusion and ease. It was a part of the price given by him to her to secure the continuance of their meretricious relations. Under these circumstances, the court will not interfere to secure to the plaintiff the title to or possession of property bought with money which he has thus made a part of the price of such unlawful conduct. It will leave the parties in the position in which they have placed themselves.

The decree of the Superior Court denying the plaintiff's motion for leave to amend his bill and the decree dismissing his bill with costs must both be affirmed.

So ordered.

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JOHN O'BRIEN *vs.* NEIL McNEIL & another.

Norfolk. March 16, 1908. — May 22, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Equity Jurisdiction, Accounting. *Trust. Mortgage. Interest. Contract. Equity Pleading and Practice*, Exceptions to master's report.

One, who, at the request and for the benefit of the mortgagor and owner of the equity of redemption of certain real estate, purchased the real estate at a sale made in foreclosure of the mortgage for $8,000, taking the title in his own name, afterwards with the mortgagor's consent procured a loan of $6,000 for which he gave his note bearing interest at four per cent and secured by a new mortgage upon the property. Subsequently, at a time after such purchaser had made several payments of interest upon the new mortgage note, the original mortgagor by a bill in equity sought from him an accounting and reconveyance of the property, subject to the new mortgage. A master to whom the suit was referred charged the plaintiff in the accounting with interest at the rate of six per cent upon the $8,000 which the defendant paid for the property at the foreclosure sale, and also with the payments of four per cent interest which the defendant had made on the new mortgage, but credited the plaintiff with but four per cent interest on the $6,000 which the defendant had received on the new mortgage; and the plaintiff excepted. *Held*, that the exception must be sustained, since the defendant received the $6,000 to his own use and therefore should be charged and the plaintiff credited with six per cent interest thereon.

From the report of a master to whom a bill in equity for an accounting had been referred, it appeared that on January 1, 1902, a third person held a promissory note of the plaintiff dated August 6, 1901, for $10,989.38, payable three months after its date and bearing interest payable monthly from July 3, 1901, at the rate of eight per cent per annum, that the note was secured by collateral upon which the holder was threatening to foreclose, and that, at the request of the plaintiff, the defendant paid to the holder of the note on January 16, 1902, the sum of $11,528.62 and took the note by indorsement and the collateral, to secure repayment to him of the amount then advanced for the plaintiff. The report did not state how the sum of $11,528.62 was made up. In the statement of the account, the master charged the plaintiff with the principal amount of the note and with interest thereon at the rate of eight per cent from the date of the note to a date after that on which the defendant took up the note for the plaintiff, and also charged the plaintiff with "Amount advanced by the defendant to the plaintiff in excess of" the note, $589.24. The plaintiff excepted to the last named item, contending that it appeared from the report that the plaintiff was thus charged twice with interest upon the amount of the note. *Held*, that the exception should be sustained.

Exceptions to material findings of fact by a master will not be sustained where the evidence upon which the findings were made is not reported and it does not appear that the findings are inconsistent with the rest of the report.

A master, to whom was referred a bill in equity for an accounting and reconveyance brought by one, who had been the mortgagor and owner of the equity of

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redemption of certain apartment house property, against one, who, at his request and for his benefit, had purchased the property at foreclosure sale, ruled that the defendant stood in the position of a mortgagee in possession, and the plaintiff in that of a mortgagor seeking to redeem, found that certain payments by the defendant for the premises for new heating apparatus, new window screens, and new receptacles for garbage and ashes were necessary and proper, and that an alteration in the front of the building, which changed a window into a door with steps so that the front room could be used for a small store, was not a damage to the estate, but enabled the defendant to rent the property continuously at an advanced rent. There was no finding in terms as to whether the alteration was or was not beneficial, but the master reported at length as to the nature of the surrounding real estate. The account charged the plaintiff with the defendant's outlay for the above purposes. *Held*, that on the facts reported it did not appear that the finding of the master in making the charge was wrong.

BILL IN EQUITY, filed in the Superior Court for the county of Norfolk, October 2, 1905.

The bill alleged that the defendant McNeil had advanced money from time to time for the plaintiff to prevent foreclosure of mortgages on properties of the plaintiff, among them being apartment house property numbered 266 to 276 on Bowdoin Street in that part of Boston called Dorchester, and had, as security, taken assignments of the mortgages; that he had purchased for the plaintiff at a foreclosure sale real estate at 269 St. Botolph Street in Boston, advancing the money therefor, and, by agreement with the plaintiff, had had the property conveyed to the defendant Campbell, who held it subject to the payment to McNeil of all indebtedness of the plaintiff to him; that, against the plaintiff's objection, McNeil had foreclosed the mortgages which had been assigned to him, and had purchased the properties at the foreclosure sales, and afterwards had sold them, but that he still held the property on St. Botolph Street; that the accounts between the parties were complicated, and that the plaintiff believed that there was nothing due from him to McNeil. The plaintiff, however, offered in the bill to pay any amount that might be found to be due from him to McNeil, and prayed for an accounting and a reconveyance of the St. Botolph Street property, subject to a mortgage placed thereon, as stated in the opinion.

The case was referred to a master, who filed a report containing the findings stated in the opinion, and the following findings, not set out, but referred to, in the opinion.

"On October 26, 1904, [at which time McNeil was in posses-

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sion of the Bowdoin Street property] McNeil received from the board of health of Boston two notices, one ordering him to remove within six days 'a nuisance, source of filth, and cause of sickness,' namely, 'defective drainage, need of garbage and ash barrels,' on the premises numbered 270 Bowdoin Street; the other ordering him to remove a nuisance, namely, 'dirty yards and need of ash and garbage barrels,' on the premises numbered 266 to 276 Bowdoin Street. On January 30, 1905, he received a notice from the water department of Boston that certain water fixtures in the house No. 269 St. Botolph Street were out of order; and a further notice from the board of health, dated November 10, 1905, that unless the nuisance previously complained of was abated by November 15, a complaint would be made to the court.

"During the years 1904 and 1905, McNeil received numerous complaints, both oral and written, from the tenants of the Bowdoin Street property, of insufficient heat in their apartments and of needed repairs. Thereupon he caused necessary repairs to be made from time to time, and, after a personal examination of the premises, he put new heating apparatus into two of the houses in November, 1904, substituting hot water for steam, against the plaintiff's objection, at an expense of about $1,150. He also supplied the six houses with twelve boxes, two for each house, for garbage and ashes, at an expense of about $160, and further supplied the houses with new window screens at an expense of $127.20. These three expenditures above mentioned were contested by the plaintiff, but I find that they were necessary and proper. . . .

"On July 24, 1905, McNeil wrote to the plaintiff as follows: 'In the house, 269 St. Botolph Street, there has got to be a new heating apparatus put in before fall, as the old boiler gave us a great deal of trouble all last winter, and the repairs cost more than it is worth. Let us hear from you on this matter without delay.' On July 25, the plaintiff replied to this letter as follows: 'I will say, as I have always before, I cannot authorize you to make any repairs or contract any expense on my account.' The boiler in question finally burst, and McNeil put in a new one during the month of December, 1905, at an expense of $173. . . .

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"McNeil, without the plaintiff's knowledge or consent, altered the front of [an] apartment [in the St. Botolph Street house] by changing the middle window into a door with steps, so that the front room could be used for a small store, upon the application of a person who hired the apartment thus altered at an advanced rent, and it has been so occupied since this alteration, which did not interfere with access to the upper stories. . . . The plaintiff contended that the cost, aggregating about $100, of [such alteration] . . . should be disallowed; and that he should be allowed the sum of $1,000 as damage caused to the property by such alteration. At the request of counsel, I took a view of the premises. The house stands on the corner of St. Botolph Street and Gainsborough Street, facing on the former street. The building occupied by the New England Conservatory of Music, which faces on Huntington Avenue, runs back to St. Botolph Street, with one of its sides on Gainsborough Street, opposite the side of the house in question. Diagonally across from the latter, on the corner of Gainsborough Street and St. Botolph Street, and facing on the former, is a long one story car-barn occupied by the Boston Elevated Railway Company for storing its structures used for repairing the overhead wires and also for storing voting booths belonging to the city. Directly opposite the house in question is a double three-story apartment house of the same class, and there are similar houses around the corner on Gainsborough Street. Next to the adjoining house, No. 267 St. Botolph Street, the land is vacant for some distance, and a similar condition exists on the opposite side of the street. The store in the house in question is a small grocery. Taking into consideration the appearance of the immediate neighborhood in its entirety, I find that the premises in question have not been damaged by the alteration made by McNeil.

"I rule that McNeil stands in the position of a mortgagee in possession, and the plaintiff in that of a mortgagor seeking to redeem; and that McNeil is entitled to charge against the plaintiff only for such repairs as have been beneficial to the several estates; and I find that the repairs which McNeil has made to the houses on Bowdoin Street and St. Botolph Street, respectively, were beneficial to those estates."

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Other facts are stated in the opinion.

Various exceptions to the master's report were filed by the plaintiff, the substance of which are sufficiently indicated in the opinion. There was a hearing on the exceptions before *Sherman*, J., who overruled them all and made a decree that, on payment to McNeil of the sum of $1,395.24, the plaintiff should have the conveyance which he sought. The plaintiff appealed.

J. A. McGeough, for the plaintiff.

G. F. Ordway, for the defendant.

HAMMOND, J. This is a bill for an accounting, and it is before us upon the plaintiff's appeal from a decree of the Superior Court. The only questions argued before us arise upon the exceptions to the master's report.

Although there are two defendants, McNeil is the only real defendant in interest, and we shall use the word "defendant" to describe him alone.

The first exception raises the question whether the defendant is to be charged with interest at the rate of six per cent per annum upon the $6,000 which was received by him on a mortgage placed by Campbell, acting as his agent, on the St. Botolph Street estate. As to this the master reports as follows: "Upon the mortgage of $6,000 above mentioned, McNeil has paid interest at the rate of four per cent to October 1, 1906, and at the rate of four and one half per cent since that date; and he is entitled to charge the sums so paid against the plaintiff. The latter contends that he is entitled to receive from McNeil interest on the principal sum at the rate of six per cent. But I have treated this mortgage as a transaction standing by itself, and instead of putting it into the account on the same basis as the other amounts credited as partial payments and allowing interest accordingly, I have treated it as a credit to be deducted at the end of the account, and, in view of the circumstances, I rule that the plaintiff is not entitled to receive any greater interest than that paid by McNeil, and I allow one to offset the other."

Even if the transaction be treated as a separate matter, we think that the plaintiff is entitled to interest at the rate of six per cent upon this sum. One Wheeler held a first mortgage of $6,500 on the estate; and there was thereon also a second mort-

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gage for $2,600, signed by one Burton and belonging to the plaintiff but held by Gately as a part of the collateral security for the indebtedness due him from the plaintiff. The plaintiff was the owner of the estate subject to these two mortgages. At the time when the plaintiff applied to the defendant for assistance in the Gately matter, Wheeler was threatening to foreclose the first mortgage, and McNeil, being apprised of this fact, advised the plaintiff to allow the sales to go on, and he promised the plaintiff he would attend it. The defendant attended "the sale with the plaintiff and bid in the property for $8,000, on December 31, 1901, paying $600 at the time of the sale and the balance of $7,400 later. The conveyance was made to Campbell [who took for the defendant] who, on February 5, 1902, at McNeil's direction, and with the plaintiff's consent, placed a new mortgage of $6,000 on the property." The defendant received this $6,000 to his own use.

It thus appears that the defendant advanced to the plaintiff $8,000, and shortly afterwards received $6,000, the proceeds of the Campbell mortgage. The master has charged the plaintiff interest at the rate of six per cent upon the $8,000 advanced by the defendant, but has not credited him with any interest upon the $6,000 received by the defendant. It is manifest that, if the plaintiff is to be charged with interest upon the $8,000, he should be credited with interest at the same rate upon the $6,000. But it is to be noted that the interest already paid by the defendant at the rate of four per cent and four and one half per cent has enured to the benefit of the plaintiff, inasmuch as it has been paid to reduce a charge upon the estate on St. Botolph Street, the only property now held by the defendant and which the plaintiff desires to redeem. There must therefore be deducted from the interest upon the $6,000, at the rate of six per cent, the amounts already paid by the defendant as interest, and only the difference is to be credited to the plaintiff. The first exception must be sustained.

The second exception raises the question whether the master has twice charged against the plaintiff the interest upon the note which Gately held against the plaintiff. This was a note dated August 6, 1901, for the sum of $10,989.38, signed by the plaintiff and payable to Thomas F. Reddy, three months after

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date, with interest payable monthly from July 3, 1901, at the rate of eight per cent per annum, and it was indorsed to Gately, who held the same with certain securities as collateral as set forth in the report. Gately was threatening to foreclose some of the mortgages which he thus held as security. Thereupon the plaintiff, about January 1, 1902, applied for financial assistance to the defendant, who lent him the sum of $11,528.62, by check dated January 16, 1902, and payable to Gately, and it was paid. The Reddy note held by Gately was indorsed without recourse by Gately to the defendant and delivered to him. At the same time the securities held as collateral were properly assigned by Gately to the defendant.

It is not stated how the sum of $11,528.62 due Gately and paid to him by the defendant for the plaintiff was made up. The face of the Reddy note was only $10,989.38, and, even if no interest at all * had been paid upon it, there would have been due as interest on January 16, 1902, only $469.17, making the sum total due on the note at that date only $11,458.55, which is about $70 less than the sum the defendant paid to Gately. The master has charged the plaintiff full interest upon the note, as though none ever had been paid on it up to the time of the settlement with Gately, and he has also charged the plaintiff with "Amount advanced by McNeil to the plaintiff in excess of latter's note to Reddy indorsed to McNeil, $539.24," which sum is just the difference between the face of the note and the sum advanced by McNeil. If therefore the Reddy note was the only claim Gately had against the plaintiff, it is plain that the master has charged the plaintiff twice with the interest on the Reddy note. And such is the contention of the plaintiff. On the other hand, the defendant argues that according to the allegations in the bill the plaintiff owed Gately $11,528.62, and that there is nothing in the report to sustain the contention that the $539.24, or any part of it, was for interest on the note, and

* From the master's statement of the account it appears that, by sales of the collateral which secured the Reddy note, the amount of the note and interest was paid on November 7, 1904. The account charges the plaintiff with the principal of the note and with interest thereon, figured by partial payments, from its date to November 7, 1904. The first item of interest is "Int. on same to February 1, 1902, . . . at 8 % — 5 m. 25 d. — $427.36."

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further, that the master has found to the contrary by the manner in which he has described the item, as above stated.

The matter is not very clearly set forth in the report. We are not satisfied with the defendant's explanation. It is certain that the master has charged the plaintiff with interest on the note from July 3, 1901, the time when it began to run. The fair inference is that no interest ever had been paid at the time of the settlement with Gately, and that there was due Gately on January 16, 1902, the face of the note with interest from July 3, 1901, amounting in all, as above stated, to $11,458.55. If, therefore, the statement of the master that the $539.24 represents an amount paid by McNeil "in excess of the . . . [plaintiff's] note to Reddy" is to be taken literally, then the amount owed by the plaintiff to Gately was not $11,528.62, but $11,458.55, plus $539.24, making the sum of $11,997.79. This interpretation of the report is not satisfactory. We think that the only reasonable interpretation of this entry that the $539.24 was in excess of the note is that it was in excess of the principal of the note. If it is to be thus interpreted, then it seems plain that some portion of the interest on this note has been charged twice against the plaintiff. It well may be that the $70 above named may have been for costs and expenses which may have been incurred by Gately. The result is that the second exception must be sustained.

The third, fourth and seventh exceptions are based upon the alleged state of the evidence. As the evidence is not reported and the facts upon which the exceptions are respectively based are not set out in the report, these exceptions must be overruled.

The fifth exception raises the question whether the plaintiff should be charged with the cost incurred by the defendant in providing for the Bowdoin Street property a new heating apparatus, new window screens, and also new receptacles for garbage and ashes. It appears that the master ruled that McNeil stood in the position of a mortgagee in possession, and the plaintiff in that of a mortgagor seeking to redeem. The statute R. L. c. 187, § 20, provides that the mortgagee shall be allowed for all amounts "expended in reasonable repairs and improvements, . . . and for all other necessary expenses in the care and man-

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agement of the land." The master has found all these expenses to be necessary and proper. The evidence is not reported and there is no fact stated in the report which is inconsistent with such a finding. This exception therefore is overruled. *Woodward* v. *Phillips*, 14 Gray, 132.

For similar reasons the sixth and eighth exceptions also must be overruled. It is true that the master does not distinctly say that the charges to which these exceptions respectively relate were necessary, but the correspondence, set out in the report, which took place between the plaintiff and the defendant indicates that there was need of a new heating apparatus in the St. Botolph Street house, and we understand that the finding that the change was beneficial, when taken in connection with the facts reported, is in substance a finding that it was a reasonable repair. There is more doubt as to the cost of cutting the doorway of the house and substituting a door for the middle window in the front of the lower apartment, but upon the facts appearing in the report we cannot say that the master was wrong in charging the plaintiff with the cost of the changes.

The ninth exception must be overruled because it appears from the decree that the mortgage on the Sharon property had been discharged before the decree was passed.

The result is that the seven last exceptions are overruled, but the first and second exceptions are sustained. The final decree must be reversed, and the case is to stand for further hearing upon the matters to which the first and second exceptions respectively relate.

So ordered.

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ALVIN J. GORDON *vs.* JOHN W. KNOTT & others.

Suffolk. March 25, 26, 1908. — May 22, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Good Will. Equity Jurisdiction, Accounting. *Evidence*, Foreign law, Presumptions and burden of proof.

A corporation engaged in the United States in the manufacture of rubber goods made a contract in writing with one whom it appointed its *del credere* agent in England by which goods were sent to the agent on consignment only, the title to them to remain in the company until they were sold to a customer, and full knowledge of all the details of the agent's operation, of his lists and of his customers was secured to the company. The agent acquired an extended knowledge of and large experience in the business of selling the company's goods, and a wide acquaintance with travelling salesmen in the business and with probable purchasers of such goods. Becoming dissatisfied with the working out of the contract, the parties agreed to terminate it, and the agent executed and delivered to the company an assignment in writing which was drawn up by the company's solicitor and which stated that the agent "as beneficial owner hereby assigns to" a nominee of the company "all the leasehold premises upon which the business is carried on . . . and all the goodwill of the said business and all the plant, materials, stock in trade, book debts, and assets whatsoever," the company agreeing to account to the agent for the value of what was covered by the assignment. The company refused to account for the value of the good will, and the agent brought a suit in equity to compel it to do so, after a hearing in which the presiding justice found "that the plaintiff was the owner of something which the parties called a good will," which the defendant had agreed to pay for; and he ordered the accounting prayed for. The defendant appealed. *Held*, that the justice well might have found that the knowledge, experience, acquaintance and ability of the plaintiff constituted what the parties called a good will, which the plaintiff could not use after the assignment, and which might be found to be of value, and for which, therefore, in accordance with the agreement, the defendant should account to the plaintiff.

Upon the question of fact what the law of England is upon a particular subject, this court can no more consider statements made in one of their previous opinions than it can consider decisions of the English courts not put in evidence at the hearing.

In the absence of evidence, it cannot be presumed that the common or the commercial law of England differs from that of this Commonwealth.

BILL IN EQUITY for an accounting, filed in the Supreme Judicial Court for the county of Suffolk, May 14, 1901.

At the hearing, which was before *Morton*, J., the evidence was taken by a commissioner, and it appeared that, from the year 1884 to October 28, 1896, the plaintiff was engaged in

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business in London, England, dealing largely in goods made by the defendant Boston Rubber Shoe Company, which goods, during the earlier part of the period, it sold outright to him, and, during the latter part of the period, consigned to him to be paid for after he had sold them. The course of dealing between the parties in the years 1894 to 1896, inclusive, was governed by various contracts in writing.

On October 28, 1896, the parties agreed to sever their relations, and an agreement in writing was executed by the plaintiff, by the defendant Leland on behalf of the defendant company, and by the defendant Knott, which provided as follows:

"1. The said A. J. Gordon as beneficial owner hereby assigns unto the said John Wood Knott firstly all those the said leasehold premises upon which his said business is now carried on for all the residue of the term for which the same are now held, and secondly all the good will of the said business and all the plant, materials, stock-in-trade, book debts, and assets whatsoever to which the said A. J. Gordon is entitled and the benefit of all contracts and orders in connection with said business.

"2. The said A. J. Gordon hereby irrevocably appoints the said John Wood Knott to be the attorney of him the said A. J. Gordon, in the name of the said A. J. Gordon or otherwise, to demand, sue for, recover and receive and give effectual receipts for the said book debts, assets and premises hereby assigned or any part or parts thereof and endorse checques in respect thereof.

"3. Nothing herein contained shall in any wise affect the liability of the said A. J. Gordon in respect to any subsisting liability of the said A. J. Gordon to the Company or any settlement of accounts between the said A. J. Gordon and the Company."

The plaintiff contended and introduced evidence tending to show that the above agreement and assignment was made "upon the trust, agreement and understanding that the assignee, or the Boston Rubber Shoe Company, should thereafter account to the plaintiff for the property received thereunder."

It appeared in evidence that in August, 1895, the plaintiff and the defendant company made a detailed contract in writing as to the defendant's acting as the company's *del credere* agent,

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goods to be consigned to him merely, the title to them to remain in the company until they were sold to a customer.

The plaintiff introduced a list of customers with whom he dealt as agent which contained something over sixteen hundred names and addresses, of which something over seven hundred showed addresses outside of the British Isles and the remainder within the British Isles, viz., in England, Ireland, Scotland, Wales, and adjoining islands. The addresses outside of the British Isles were distributed through Germany, France, Italy, Austria, Hungary, Holland, Belgium, Denmark, Norway, Sweden, Switzerland, and a few in Spain, Russia, Turkey, Roumania, Africa, South America, China, Japan, Australia.

The evidence to the introduction of which the defendant excepted, as stated in the opinion, was that the defendant's president, Converse, said to the plaintiff in 1884, before he went abroad at all, that he, Converse, considered the foreign business of no value. "If I could do business with the foreigners I was quite welcome to do it and he would be glad for me, but he didn't think it would be a success." That the defendant's treasurer, Leland, said to him, in connection with the signing of the contract of 1894, that the company proposed by the contract "to consign goods to me instead of selling to me, that it would help me from the fact that there would be no interest on goods carried in warehouse in London, and that, with that exception, the relations would be continued the same between the company and myself."

The defendant also excepted to the admission in evidence of conversations between the plaintiff and Leland just before the assignment of October 28, 1896, the substance of which was that after the two had been to see another company which was seeking the plaintiff's "business," they had a talk, the result of which was contained in the following:

"As to my question to him, Would he put a price on the good will of my business, he said he would pay me for it whatever it was worth. I asked him to put it in writing. He would not do that — said his word had never been doubted. . . .

"There was a talk about what constituted good will. . . .

"I showed him the file of my letters from customers; I showed him my letter book, and told him, 'There is where the good will

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is'; I told him if I turned over the business to him, this good will 'would not be mine, it would be yours; if I have a letter I cannot answer it.' He said 'That is true; we take the business as you leave it, — whatever there is here we will pay you for.' I asked him to put it in writing, — to put those answers in writing, and he refused to do it."

The single justice made the following finding:

"The last instrument executed by the parties was the transfer from the plaintiff to the defendant of October 28, 1896. This recites that the plaintiff is the beneficial owner of the good will. From this and other evidence I find as a fact that the plaintiff was the owner of something which the parties called a good will. And I find from the evidence before me that the defendant through its agent agreed in consideration of the transfer of the good will and other property to pay the plaintiff for such good will. The plaintiff testified that there was such an agreement. Abbott [the plaintiff's bookkeeper] testified that the agent agreed with the plaintiff that the company should satisfy him, and it seems to me that the circumstances are more consistent with the view that there was a promise to pay for the good will than that there was not. Therefore I find for the plaintiff."

Accordingly he ordered a decree for the plaintiff, and, at the request of the defendant, reported the case for consideration by the full court.

C. R. Darling, for the plaintiff.

E. R. Thayer, for the defendants.

SHELDON, J. The principal question argued in this case is whether the finding made by the single justice, "that the plaintiff was the owner of something which the parties called a good will," and that the Boston Rubber Shoe Company, hereinafter called the defendant, agreed to pay the plaintiff for this *quasi* good will, should be reversed. Under the recognized rule, it is to be sustained unless upon the evidence reported it was clearly wrong. *Elliott* v. *Baker*, 194 Mass. 518. *Lindsey* v. *Bird*, 193 Mass. 200.

There is great force in the defendant's contention that, as the business which the plaintiff was carrying on in London in October, 1896, was and for two years had been carried on by him merely as the agent of the defendant, and as the rubber boots

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and shoes which constituted the stock in trade had been merely consigned to him by the defendant for sale, and it was his duty only to sell them for the defendant, so the business was the defendant's business, and the good will of that business was the defendant's own property and did not belong to the plaintiff at all. So far as the good will of the business depended upon the reputation of the goods which had been sold, that belonged to the defendant. So far as it depended upon the possession of a valuable list of customers in various countries who would buy rubber boots and shoes, and the consequent ability to communicate readily with probable purchasers of such goods and thus to effect larger sales at a less expense and with less trouble than otherwise would be the case, full knowledge of all these particulars was already secured to the defendant by the agreements made between itself and the plaintiff on April 2, 1894, and August 1, 1895, respectively. So far as the good will depended upon the effect of the plaintiff's personality in the business, the defendant rightly says that this was not included in what the plaintiff turned over to Knott for its benefit.

But it could be found that these considerations do not cover the whole of the existent good will of this business. The plaintiff had built up a very large trade in England and other foreign countries; and, although this does not appear to have been profitable, yet so extensive a connection as he had formed might under a wiser management or more fortunate circumstances be capable of returning large gains. At any rate, the defendant regarded it as worth while to take a transfer not only of all the assets of the business and of the plaintiff's leasehold estate in the premises in which it was carried on, but also of the good will, of which the plaintiff was called in the assignment the beneficial owner. The plaintiff himself, according to one part of the evidence, specified his good will as consisting of or situated in his file of letters from customers. It may be conceded that the plaintiff, before making the actual transfer and delivery to the defendant's nominee of what the defendant was really entitled to receive, could not have copied for his own future benefit the accounts or the letters or the names of customers with whom he had dealt only as the defendant's agent and for its benefit. Bowen, L. J., in *Helmore* v. *Smith*, 35 Ch. D. 449, 456. *Lamb* v.

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Evans, [1893] 1 Ch. 218, 226. *Robb* v. *Green*, [1895] 2 Q. B. 1. But the personal knowledge which the plaintiff had acquired of the business of selling rubber boots and shoes was great; his experience in it had been large; his acquaintance both with the travelling salesmen through whom apparently sales were generally made, and with probable purchasers of such goods, was extensive. It well might have been within the contemplation of both parties that he could secure an ample supply of such merchandise from other sources, and become so troublesome a competitor with the defendant in the business which it was taking up through Knott, as to make all the difference between a profit and a loss to the defendant in the prosecution of that business. Apparently there was nothing to prevent the plaintiff from taking that course; and this knowledge, experience, acquaintance and ability of his might well be found, as apparently it was found by the single justice, to constitute what the parties to this agreement called a good will.

So far as there was such a good will, it was transferred to the defendant. After the transfer, the plaintiff, under our decisions, could not derogate from his grant by engaging in a competing business of the same kind, selling the same goods, and endeavoring to deal with the same customers. *Old Corner Book Store* v. *Upham*, 194 Mass. 101. *Munsey* v. *Butterfield*, 183 Mass. 492. *Dwight* v. *Hamilton*, 113 Mass. 175. *Angier* v. *Webber*, 14 Allen, 211. Such a case as is now before us would be governed by the rule of these decisions, and would not come under the doctrine of *Hoxie* v. *Chaney*, 143 Mass. 592, and *Bassett* v. *Percival*, 5 Allen, 345. See the opinions in *Old Corner Book Store* v. *Upham*, and *Hoxie* v. *Chaney*, *ubi supra*, and *Webster* v. *Webster*, 180 Mass. 310, in which the distinction between these two classes of cases is stated. The case at bar is peculiarly one in which the plaintiff could not have set up a competing business without derogating from his grant of the good will of the old business.

But the defendant contends that whatever the rule might have been if this agreement had been made in Massachusetts, the rule adopted in the English courts is different; and that this, being an English contract drawn by English solicitors, who must be presumed to have had in mind the decisions of their own courts, must be governed by the English law. This may be conceded.

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And the defendant contends that under the law of England the plaintiff could not be restrained from setting up a competing business. He relies upon the language of Loring, J., in *Hutchinson* v. *Nay*, 187 Mass. 262, 264, in which it is shown that the rule of *Labouchere* v. *Dawson*, L. R. 13 Eq. 322, to the effect already stated, although since doubted or denied in other cases, has been finally confirmed by the House of Lords in *Trego* v. *Hunt*, [1896] A. C. 7. But to this contention there are two answers.

In the first place, even if this rule were applied to the contract before us, the plaintiff, under the agreement which he has made, would not be allowed to solicit orders from his former customers, even though he might set up a competing business. Accordingly the extent and value of the good will which he had transferred to Knott, though much diminished, would not be wholly destroyed. But, in the second place, the real answer to this contention is that when, in a contest in our own courts, the rights of the parties depend upon any foreign law, what that law is is purely a question of fact, to be determined by such evidence as may be offered thereof. R. L. c. 175, §§ 71, 75, 76. *Demelman* v. *Brazier*, 193 Mass. 588. We do not find that there was any evidence of the law of England as to this matter before the single justice; and we cannot ourselves consider evidence which was not introduced before him. But in the absence of evidence, it cannot be presumed that the common or the commercial law of England differs from ours. *Callender, McAuslan & Troup Co.* v. *Flint*, 187 Mass. 104. *Cherry* v. *Sprague*, 187 Mass. 118. *Mittenthal* v. *Mascagni*, 183 Mass. 19, 23. *Chase* v. *Alliance Ins. Co.* 9 Allen, 311. Upon this question of fact, we can no more consider statements made in the reasoning adopted in the opinions of our own court than decisions in the English courts not put in evidence at the hearing. Accordingly this contention of the defendant must fail.

It may be added that the words of the agreement in question in which the plaintiff is called the beneficial owner of the property assigned are not without weight upon the question, though their probative value is of course much lessened, both by the fact that he was in no sense the beneficial owner of much of the property assigned, and by the further fact that Leland, who rep-

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resented the defendant in the negotiations that preceded the making of the assignment, had refused in those negotiations to admit that the plaintiff owned any good will in the business. On the whole, we are satisfied that the finding of the single justice upon this question was warranted by the evidence and cannot be set aside; and it is conceded that in that event the further finding that the defendant had agreed to pay for this something in the nature of a good will was also warranted.

It is very difficult, to be sure, to see how such a qualified and limited good will could have any considerable pecuniary value; but that question is not before us. After the decree that the plaintiff is entitled to an accounting shall have been entered, the value of this good will, as well as of the leasehold premises and his office furniture and of any commissions to which the plaintiff may have become entitled, and of any part of the deposit in the Bank of England that may be found to have been his private property, as well as the amount of the Albert L. Gordon note, and the amount of the plaintiff's indebtedness to the defendant, will all be open for investigation either before a single justice or before a master.

As to the testimony, the admission of which was excepted to, we are of opinion that, so far as it has not turned out to be immaterial, it was admissible to prove the promise of the defendant to pay the plaintiff for his good will and to show the meaning put by the parties upon that term, and the conditions which existed while the contract was under consideration. *Smith* v. *Vose & Sons Piano Co.* 194 Mass. 193, and cases there cited.

Accordingly, a decree will be entered declaring that the plaintiff is entitled to an accounting with the defendant as already stated.

So ordered.

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ÆTNA LIFE INSURANCE COMPANY *vs.* FRANK H. HARDISON.
TRAVELERS' INSURANCE COMPANY *vs.* SAME.

Suffolk. March 18, 19, 1908. — May 23, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Insurance, Life, Endowment, Accident, Statutory requirements as to substance and form of policy. *Insurance Commissioner. Statute.*

Under St. 1907, c. 576, § 75, providing that no policy of life or endowment insurance shall be issued in this Commonwealth until a copy of its form has been filed at least thirty days with the insurance commissioner, or if the insurance commissioner notifies the company in writing within thirty days that in his opinion the form does not comply with the requirements of the laws of this Commonwealth, and that no such policy, except certain policies of industrial insurance, shall be issued unless it contains in substance certain provisions specified in the statute, it is the duty of the insurance commissioner to determine whether the policy contains the substantive provisions, called for by the statutes of this Commonwealth, in such a form as to give proper effect to the contract.

If the form of a policy of life or endowment insurance submitted by an insurance company to the insurance commissioner for his approval under St. 1907, c. 576, § 75, contains in substance the ten provisions specified in that section, and also contains the other prescribed parts of a policy, the form in which they are stated may be varied, and additional provisions beneficial to the insured may be inserted, provided the requirements of the statute are satisfied and are left undiminished by what is added.

A policy of life or endowment insurance which on its first page states "This contract is issued in consideration of the application for this insurance which is made a part hereof and copied hereon," and under the head "General Conditions," and the subhead "Entire Contract," on a subsequent page states, "This instrument contains the entire contract between the parties hereto, and all the statements purporting to be made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall be used in defense of a claim under the contract unless it be contained in the application herefor," does not satisfy the requirements of St. 1907, c. 576, § 75, cl. 3, that the policy shall contain "a provision that the policy and the application therefor shall constitute the entire contract between the parties . . . and that no . . . statement [of the insured] shall be used in defense to a claim under the policy unless it is contained in a written application, and a copy of such application shall be endorsed upon or attached to the policy when issued"; but the words "and the application" should be added after the words "This instrument," at the beginning of the clause entitled "Entire Contract," and the words "and the application is attached hereto" should be added at the end.

A life insurance company, which, under St. 1907, c. 576, § 84, cl. e, might also transact the business of insurance against bodily injury or death by accident, and upon the health of individuals, presented to the insurance commissioner, as required to do by § 75, a form of policy, which on its first page stated that the company agreed "to pay for the surrender of the policy [a certain sum to the beneficiary] . . . upon receipt of due proof of the death of the insured," and

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that the policy "is issued . . . subject to all the conditions, benefits and privileges described on the subsequent pages" thereof, which "are hereby made a part of this contract." On a subsequent page was a provision that, in case the company received proof that, "by reason of bodily injuries or disease originating after the issue of the policy, the insured has become wholly, continuously and permanently unable to perform any work" for profit, or under certain circumstances had lost both eyes or either or both hands or feet, the company would keep the policy in force for twelve months and then pay the insured one twentieth of the sum insured and make the same payment annually until the whole insured amount was paid, or would pay a specified annuity for life. The insurance commissioner disapproved of the policy. *Held*, that the commissioner's disapproval was warranted, since the form of policy presented violated the provisions of § 34 in that it contained in one policy contracts for insurance of two of the classes therein named.

A life insurance company, which, under St. 1907, c. 576, § 34, cl. e, also might transact the business of insurance against bodily injury or death by accident, and upon the health of individuals, presented to the insurance commissioner, as required to do by § 75, a form of policy, which on its first page stated that the company agreed to pay a certain amount to the beneficiary on due proof of the death of the insured, and that "this contract is subject to the privileges and conditions recited on the subsequent pages hereof." On a subsequent page under the head "Special Privileges" was a provision that in case the insured should furnish satisfactory proof that he had become "wholly disabled by bodily injuries or disease and will be permanently, continuously and wholly prevented thereby for life from pursuing any and all gainful occupation, the company" would, "by an indorsement in writing upon this contract," agree to pay the premiums on the policy so long as the disability continued, without charging them against the contract, and that certain cash loans and other values elsewhere specified in the contract should increase in the same manner as if the premiums were paid by the insured; but that the insured might at any time cancel such premiums and be entitled to a reduction of twenty-five cents for each $1,000 of insurance upon his annual premiums. The insurance commissioner disapproved of the policy. *Held*, that the commissioner's disapproval was warranted, since the form of policy presented violated the provisions of § 34 in that it contained in one policy contracts for insurance of two of the classes therein named.

TWO PETITIONS, filed in the Supreme Judicial Court for the county of Suffolk February 18, 1908, by foreign life insurance companies, seeking, under St. 1907, c. 576, § 75, a review of action of the insurance commissioner with regard to the forms of policies which the petitioners, respectively, purposed to issue in this Commonwealth.

The petitions were heard together before *Rugg*, J. It appeared that the form of policy submitted to the insurance commissioner by the Ætna Life Insurance Company stated on its first page that the company "agrees to pay for the surrender of this policy . . . the sum of . . . (herein called the sum

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insured) upon receipt of due proof of the death of . . . (herein called the insured) during the continuance of this policy; or the company will pay the said sum at the end of the policy year falling nearest to [a certain age of the insured] if the insured is then living. This policy is issued and accepted subject to all the conditions, benefits and privileges described on the subsequent pages hereof, and which are hereby made a part of this contract." On a subsequent page was the following, to which the insurance commissioner objected, as stated in the opinion:

"28. Total and Permanent Disability.

"If proof is received by the Company that by reason of bodily injuries or disease originating after the issue of this policy the insured has become wholly, continuously and permanently unable to perform any work or follow any occupation for compensation or profit, this insurance will, if all premiums previously due have been paid, continue in full force for twelve months from the time the next premium falls due without payment of premium. At the expiration of that time the Company will, upon the request of the life beneficiary, and assignee, if any, pay in full settlement of this policy and in lieu of all other benefits and privileges herein provided either one-twentieth of the sum insured, and will pay the same amount annually thereafter until the entire sum insured has been paid; or will pay the amount of annuity shown by [a table annexed] for the age of the insured at the last birthday preceding the approval of such proofs and the same amount annually thereafter during the lifetime of the insured, provided that at every such annuity payment satisfactory proof is furnished that the insured is then living. In either case any indebtedness to the Company against the policy will reduce the annuity payment by the Company in the same proportion that such indebtedness bears to the sum insured. If neither of the above instalment payments is requested, the insurance may, at the expiration of said twelve months be continued under its original conditions by the payment within the days of grace of the premium then due, or the policy will be entitled to the non-forfeiting values herein provided. If the policy has reached the condition where by its terms it has become full-paid at the expiration of the twelve months above described, it may then

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enter upon the disability benefits and privileges herein provided upon request of the life beneficiary and assignee to that effect.

"The Company will also extend the privileges and benefits for total and permanent disability above described to cover the irrecoverable loss of the entire sight of both eyes, or the total and permanent loss by removal or disease of the use of both hands, or of both feet, or of such loss of one hand and one foot, all occurring after the issue of this policy and before default in the payment of premium.

"If the insured shall recover from the total disability above described before the expiration of the said twelve months the payment of premiums hereon may be resumed with the premium falling due next after such recovery and the insurance will continue as originally issued; or if such recovery occurs and premiums are not resumed, then the policy shall be regarded as lapsing with the non-payment of the first premium due after such recovery, and entitled to the non-forfeiting values hereinbefore described, subject to the total indebtedness hereon.

"Any benefit for total and permanent disability within the meaning of this policy is conditioned upon the Company being permitted to examine the insured when desired within one year from the receipt and approval of the proof."

The form of policy submitted to the insurance commissioner by the Travelers' Insurance Company stated on its first page that the company "agrees to pay . . . dollars . . . to [the beneficiary] . . . immediately on receipt of due proofs of the death, during the continuance of this contract, of . . . the insured. . . . This contract is issued in consideration of the application for this insurance which is made a part hereof and copied hereon and of the premium. . . . This contract is subject to the privileges and conditions recited on the subsequent pages hereof." On a subsequent page under the heading "Special Privileges" was the following, to which, as stated in the opinion, the insurance commissioner objected:

"Protection to Contract if Insured is wholly Disabled.

"After one full annual payment shall have been made and before a default in the payment of any subsequent premium, if the Insured prior to attaining the age of sixty shall furnish sat-

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isfactory proof that he has become wholly disabled by bodily injuries or disease and will be permanently, continuously and wholly prevented thereby for life from pursuing any and all gainful occupations, the Company, by an indorsement in writing upon this contract, will agree to pay for the Insured the premiums which shall thereafter become payable during the continuance of such disability. In any such case the premiums so paid shall not be a lien on this contract and the cash loans and the values of this contract in the schedule on the second page hereof shall increase in the same manner as if the premiums were being paid by the Insured. If, however, the Insured shall recover so as to be able to engage in any gainful occupation the Company's obligation to pay the premiums shall cease and the Insured shall resume payment of premiums in accordance with this contract from the first premium due date following such recovery.

"If the Insured shall furnish satisfactory evidence of like total and permanent disability occurring after he shall have attained the age of sixty years, the Company will, without further action on the part of the Insured, allow the subsequent premiums to accumulate, without interest, as an indebtedness on this contract. In any such case the cash loans and the values of this contract in the schedule on the second page hereof shall increase in the same manner as if the premiums were being paid by the Insured.

"On any anniversary of this contract this provision may be canceled by the Insured, in which event the subsequent annual premiums will be reduced twenty-five cents for each one thousand dollars insurance hereunder, and such reduction will be indorsed hereon."

At the end of the policy submitted by the Travelers' Insurance Company under the heading "General Conditions," and the sub-heading "Entire Contract," was the paragraph quoted in the fourth paragraph of the opinion.

The single justice reserved the cases for the consideration of the full court.

F. H. Nash, for the petitioners.

D. Malone, Attorney General, & *J. F. Curtis*, Assistant Attorney General, for the respondent.

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KNOWLTON, C. J. These are petitions brought by foreign life insurance companies under the St. 1907, c. 576, § 75, for a review of the action of the insurance commissioner, in regard to the form of the policies which they propose to issue in this Commonwealth. The cases come to this court on the reservation of a single justice upon the petitions, answers and agreed statements of facts. Under this section every life insurance company must file with the insurance commissioner a copy of any form of policy that it proposes to issue, for his approval. If within thirty days he notifies the company that in his opinion the form of the policy does not comply with the requirements of the statute, specifying his reasons for his opinion, no policy can be issued in that form. His action in this particular is subject to review by the Supreme Judicial Court. The section further provides that no policy shall be "issued or delivered, unless it contains in substance the following provisions." Then follows a statement of ten provisions, of which the third is, "That the policy and the application therefor shall constitute the entire contract between the parties and that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties and that no such statement shall be used in defense of a claim under the policy unless it is contained in a written application and a copy of such application shall be endorsed upon or attached to the policy when issued." The provision on this subject, contained in the policy, was held by the insurance commissioner to be insufficient.

A preliminary question raised by the petitioner is whether the commissioner is authorized, by the statute, to consider matters of substance that enter into the policy, or only the form of the policy in other particulars. We have no doubt that his examination of the form of a policy to see whether it conforms to the requirements of our law was intended to involve a consideration of matters of substance called for by our statutes, and not merely of such things as the size, or shape, of the paper on which the contract appears, or the kind of type used in printing it, or the order in which different parts of the contract are set forth. It is his duty to determine whether the policy contains the substantive provisions of law called for by our statutes, in such a form as to give the contract proper effect.

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Another question is whether the provisions which, in substance, must be inserted in the policy, must appear in a form substantially identical with that given in the statute, or whether it is enough if they contain everything, in meaning and legal effect, that the statute prescribes, and at the same time include other things relating to the same subject, no one of which impairs the force of that which is prescribed for the benefit of the insured. Inasmuch as the ten provisions referred to and the other prescribed parts of the policy were intended for the protection of the policy holder, we are of opinion that, if they are contained in substance in the policy, their form may be varied, and additional provisions beneficial to the insured may be inserted, provided the requirements of the statute are satisfied, and are left undiminished by that which is added.

Instead of the third provision already quoted from § 75, the form of policy of the Travelers' Insurance Company says: "This instrument contains the entire contract between the parties hereto, and all statements purporting to be made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall be used in defense to a claim under the contract unless it be contained in the application herefor." The insurance commissioner suggested that the words, "and the application is attached hereto," be added to meet the requirement of the statute. We are of opinion that this was necessary. The language of the provision did not even make it certain that the application, or the statement referred to, was in writing. The reference to an application in the early part of the policy, especially if there should be a failure to copy the application on the policy, might not protect the rights of the insured in every case. Moreover, inasmuch as the provision is insufficient, we think it better that the words, "and the application," be also inserted after the words, "this instrument," so as to conform to the statute exactly. It is conceivable that the application might contain something helpful to the insured as a part of the contract, in connection with other provisions, and with questions that might arise.

The subject most discussed in both cases is whether the form of the policy conforms to the St. 1907, c. 576, § 84, which requires that "contracts of insurance for each of the classes speci-

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fied in section thirty-two, shall be in separate and distinct policies, notwithstanding any provision of this act which permits a company to transact more than one of said classes of insurance." Section 32 authorizes the formation of an insurance company to engage in insurance of any one of twelve different kinds or classes. The agreement of association must state the class of insurance the company proposes to transact, and on what business plan or principle. Section 33. Under § 34, neither domestic nor foreign companies, with certain specified exceptions, are permitted to transact more than one kind or class of insurance. One of these exceptions allows life insurance companies with a certain amount of paid-up capital to transact the business specified in the fifth clause, which is insurance against bodily injury, or death by accident, and upon the health of individuals.

This statute carries the regulation of the business of insurance much further than any previous legislation. It forbids the combination of two classes of insurance in the same policy, even when one company is permitted to transact insurance business of two or three classes. The petitioner contends that this quoted requirement does not apply to one of these classes of insurance, when conducted by a company in connection with life insurance. There is no reason for a distinction of this kind. The contract for insurance in each of these classes is to be in a separate and distinct policy, as well when the company is also doing the business of life insurance, as when it is furnishing insurance of any other class. There are reasons for this requirement, especially in connection with the maintenance of proper reserve funds, and with taxation. These reasons are as strong in their application to life insurance in connection with insurance in one of the classes named in § 32, as in their application to any two classes specified in the section.

It remains to inquire as to each of these companies, whether any part of the insurance referred to in the policy is within the fifth clause mentioned in § 32. That clause is, "To insure any person against bodily injury or death by accident, . . . and to make insurance upon the health of individuals." The policy of each of these companies, besides providing for life insurance in a common form, provides that after one full annual payment

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has been made, in case of impairment of health by bodily injury or disease, such as to prevent the insured for the rest of his life from pursuing any gainful occupation, an additional provision shall be made for him in some one of different ways. The first of the petitioners agrees, in such a case, to keep the policy in force twelve months, and then to pay the policy holder one twentieth of the sum insured, and make the same payment annually thereafter until the whole sum insured shall have been paid; or, to pay him a specified annuity for life. The second of the petitioners agrees, in such a case, to pay the premiums on the policy so long as the disability continues, without charging them against the contract, and the cash loans and the values of the contract are to increase in the same manner as if the premiums were being paid by the insured; but the insured may at any time cancel this provision of the policy and be entitled to a reduction of twenty-five cents for each one thousand dollars of insurance, upon his annual premiums.

It is agreed, and if it were not agreed it would be obvious, that this insurance against disability from injuries or disease is a liability which costs the company something, and for which provision must be made by way of reserve. It seems plain that it is an insurance of health and against accident. The real difference between this and an ordinary accident insurance policy is that the liability is only for a disability which is total and is thought to be permanent, and that the compensation to the insured is made in connection with a contract for life insurance, instead of being made in separate payments of money directly to the insured. But these conditions do not affect the principle. Life insurance and insurance of the fifth class, under § 32, are embodied in the same policy.

It is said that this is incidental to life insurance. In the sense that, of the two classes of insurance, one is the principal and more important and the other subordinate, it may be said to be incidental; but that is of no importance. Any two of the classes of insurance mentioned in § 32 which are kindred to each other might be combined in the same contract, and the contract might be so made that one would be the principal and the other secondary, and in their nature they might have close relations to each other. This would not enable an insurance company to

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embody them in the same policy, even though, in a sense, one might be said to be incidental to the other. In a true sense they are two different classes of insurance under the statute. It is only the attempt to incorporate them in the same contract, and connect one contract with the other, in violation of the statute, that makes one seem incidental to the other.

As to this part of the policy in each case, we are of opinion that the insurance commissioner was correct, that the form of the policy was erroneous, and that the petitioners are not entitled to relief under their petitions.

So ordered.

NEW YORK LIFE INSURANCE COMPANY *vs.* FRANK H. HARDISON.

MUTUAL BENEFIT LIFE INSURANCE COMPANY *vs.* SAME.

Suffolk. March 18, 19, 1908. — May 23, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, & LORING, JJ.

Insurance, Life, Endowment, Statutory requirements as to substance and form of policy. *Insurance Commissioner. Statute. Constitutional Law. Practice, Civil, Amicus curiae.*

A policy of life or endowment insurance, which provides for a grace of one month for the payment of every premium after the first, does not satisfy the requirement of St. 1907, c. 576, § 75, cl. 1, that a grace of thirty days shall be provided.

A provision in a policy that "This policy constitutes the entire contract between the parties, and is free of conditions as to residence, occupation, habits of life, and manner, time or place of death," is not a compliance with St. 1907, c. 576, § 75, cl. 3, requiring policies of life or endowment insurance to contain a provision "that the policy and the application therefor shall constitute the entire contract between the parties and that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties and that no such statement shall be used in defense to a claim under the policy unless it is contained in a written application and a copy of such application shall be endorsed upon or attached to the policy when issued."

No departure from the exact requirements of St. 1907, c. 576, § 75, cl. 3, relating to the effect of statements in an application for life insurance, should be permitted in any policy unless it is too plain for doubt that the substitution is in every way as advantageous and as desirable to the insured as the prescribed provision.

A provision in a policy of life or endowment insurance that it "shall be incon-

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testable, except for non-payment of premiums, from its date" is not a compliance with the requirement of St. 1907, c. 576, § 75, cl. 2, that every such policy shall contain "a provision that the policy shall be incontestable after two years from its date . . . except for non-payment of premiums and for engaging in military or naval service in time of war without the consent in writing of an executive officer of the company," and also is not in accordance with public policy.

A policy of life insurance provided that, within one month from default in premium payments, the insured might surrender the policy for its cash surrender value (which was an amount computed according to certain tables, "less any indebtedness to the company herein") or surrender the policy for a "non-participating paid-up policy," or that, if he did not surrender the policy, the insurance would be automatically extended for a period equivalent to the extended insurance which the then cash surrender value of the policy would purchase. Its reinstatement clause provided that, in case of default in premium payments, the arrears might be paid in one month, or, if the insured within the month so requested, the arrears would be charged as an indebtedness against the policy, bearing interest, provided the entire indebtedness then outstanding would be within the cash surrender value, "or this policy may be reinstated at any time after the said month, upon evidence of insurability satisfactory to the company and payment of all arrears with interest thereon, provided, in any case, the policy has not been surrendered to the company." *Held*, that, although the provision as to reinstatement did not follow the exact language of St. 1907, c. 576, § 75, cl. 10, with regard to reinstatement requirements, and did not require before reinstatement the payment of "any other indebtedness" besides arrears of premiums, it nevertheless, in connection with the other provisions of the policy, secured to the insured all that was secured by the statute, and was not objectionable.

The provision of St. 1907, c. 576, § 75, cl. 8, requiring in policies of life or endowment insurance a table "showing in figures the loan values, if any," is satisfied if the policy contains, after a statement under a heading in large type, "Loans," a statement that "At any time while this policy is in force, the company will loan up to the limit secured by the cash surrender value," followed in a succeeding paragraph by a table headed "Cash Surrender Value," stating such values for each year of the policy.

While it is a general rule that, in the consideration of a suit based upon a statute, this court will not consider the constitutionality of the statute upon an objection made by persons whose rights are not affected by it, and usually the parties to the suit are the only ones who are permitted to raise such a question, nevertheless, in a case where both the justification of the acts of the defendant and the power of the court to give the relief sought by the plaintiff depend entirely upon the validity of the statute, so that both of the parties to the suit are precluded from raising the question of the constitutionality of the statute, and the attention of the court is brought to that question by persons who are interested in the effect to be given to the statute although not interested in the precise case before the court, it is the duty of this court to consider whether it has jurisdiction before it takes affirmative action.

St. 1907, c. 576, § 75, which provides that no policy of life or endowment insurance shall be issued or delivered in this Commonwealth until a copy of its form has been filed at least thirty days with the insurance commissioner, or if the commissioner notifies the insurance company in writing within such thirty days that in his opinion the form submitted does not comply with the requirements, specifying his reasons; and that the action of the commissioner shall be subject to

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review by "the Supreme Court of the Commonwealth"; and which prescribes certain substantive provisions that must be in all such policies, is a constitutional enactment regulating the business of insurance, being within both the police power of the Legislature and within its power as the creator of domestic and the controller of domestic and of foreign corporations doing business within the Commonwealth; nor does it improperly delegate power to the commissioner, since it merely appoints him as an administrative officer to pass upon whether the forms of policies submitted conform to the legislative requirements, his decisions being subject to review in original proceedings which the companies may bring before a court of law properly designated for the purpose.

TWO PETITIONS, filed in the Supreme Judicial Court for the county of Suffolk December 26, 1907, under St. 1907, c. 576, § 75, seeking a review of the action of the insurance commissioner in refusing to approve forms of policies for life insurance which the petitioners had filed with him.

The first petition was reserved by *Morton*, J., upon the petition and answer for the consideration of the full court.

The second petition was heard before *Hammond*, J., who made a decree that the form of policy submitted by the petitioner complied with St. 1907, c. 576, § 75, cl. 8, 10, with regard to the table of loan values and to reinstatement, respectively, and with cl. 3 in all respects except that it did not contain in substance the provision as to the application, stated in the opinion. Both the petitioner and the respondent appealed from the decree.

The form of policy submitted to the petitioner in the second case contained the following provisions:

"At the end of any policy year during the whole of which this policy shall have been in force, or within one month from default in premium payments, the owner shall have the following options: (1) To surrender the policy to the company . . . for its cash surrender value; (2) to surrender the policy to the company . . . for a non-participating paid-up policy payable at the time this policy would be payable if continued in force; (3) if the policy be not surrendered as above, the insurance will be automatically extended from date of default in premium payments, without any action by the owner of the policy and without participation in surplus, for a sum equal to the amount of the policy and existing dividend additions, if any, less any indebtedness to the company hereon.

"The cash surrender value will be equal to the entire net reserve on this policy by the American Experience Mortality and

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interest at three per centum yearly, less any indebtedness to the company hereon and less a sum equal to one per centum of the amount of this policy and existing dividend additions, if any, up to and including the fifth policy year, after which the said percentage will be reduced each year one-tenth per centum of the amount insured. If there be no indebtedness the cash surrender value will be as shown in the following table.

"The amount of the paid-up policy or the term of the extended insurance, will be such as the amount of the cash surrender value will purchase at net single premium rates, according to the attained age of the insured, by the American Experience Mortality and interest at three per centum yearly, and if there be no indebtedness, will be as shown in the following table. The paid-up policy or the extended insurance will be entitled to cash surrender values equal to the reserve thereon at time of surrender, computed upon the basis hereinbefore mentioned, less any indebtedness to the company thereon.

"Except as provided in this policy any default in premium payments will immediately render the policy null and void.

"Reinstatement. In event of default in premium payments, the arrears may be paid within one month, or, if not so paid and the insured shall die within the said month, this policy will be regarded as being then in force, and the arrears will be deducted in the settlement hereof; or, if requested by the insured prior to or within the said month, the arrears will be charged as an indebtedness against this policy, bearing interest at a rate not exceeding six per centum per annum, provided the entire indebtedness then outstanding shall be within the limit secured by the cash surrender value; or this policy may be reinstated at any time after the said month, upon evidence of insurability satisfactory to the company and payment of all arrears with interest thereon at not to exceed six per centum per annum. Provided, in any case, the policy has not been surrendered to the company."

Other facts are stated in the opinion.

W. A. Morse & J. H. McIntosh (of New York), (*E. J. Geogan* with them,) for the New York Life Insurance Company.

F. H. Nash, for the Mutual Benefit Life Insurance Company,

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and, with the consent of the court, for various life insurance companies and the Association of Life Insurance Presidents on the question of the constitutionality of the statute.

D. Malone, Attorney General, & *J. F. Curtis*, Assistant Attorney General, for the respondent.

KNOWLTON, C. J. These are petitions under the St. 1907, c. 576, § 75, for a review of the action of the insurance commissioner in refusing to approve forms of policies for life insurance, filed with him by the petitioners, respectively. Certain preliminary questions that arise in each case are the same as arose and were decided in *Ætna Life Ins. Co.* v. *Hardison*, *ante*, 181.

In the first of these cases the form of policy provided for a grace of one month for the payment of every premium after the first. The St. 1907, c. 576, § 75, sub-sec. 1, provides for a grace of thirty days. A grace of one month is not the same as a grace of thirty days. It might be a longer or a shorter period, according to the time in the year when the payment became due. One month from February 10 would ordinarily be twenty-eight days. In leap year it would be twenty-nine days, but it never would be thirty days. The form of policy was insufficient in this particular.

Instead of the provision required by § 75, sub-sec. 3, the form filed by the petitioner contains this language: "This policy constitutes the entire contract between the parties, and is free of conditions as to residence, occupation, habits of life, and manner, time or place of death." For reasons stated in *Ætna Life Ins. Co.* v. *Hardison*, *ante*, 181, and for other reasons, this language should be changed so as to make it conform to the statute. The application should be included in the statement of the contract. It is conceivable that something in the application might be advantageous to the insured, as a part of the contract. *Millard* v. *Brayton*, 177 Mass. 533, 537. It was doubtless the intention of the Legislature that the insured should have in the policy an affirmative assurance that no statement will be used in defense of a claim, unless it is contained in a written application, a copy of which is indorsed upon or attached to the policy. See *Moore* v. *Northwestern Ins. Co.* 192 Mass. 468, 471. No departure from the exact provisions required by the statute should be permitted, unless it is too plain

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for doubt that the substitution is in every way as advantageous to the insured and as desirable as the prescribed provision.

The provision that the policy shall be incontestable from date,* contained in the petitioners' form of policy, is not the same as the provision that it "shall be incontestable after two years from its date," except, etc., required by sub-section 2 of § 75 of the statute. Such a provision is not in accordance with public policy. *Reagan* v. *Union Mutual Life Ins. Co.* 189 Mass. 555. The action of the insurance commissioner in reference to this form of policy was right.

In the second case, the first objection to the form of policy, made by the commissioner, was that the clause providing for reinstatement gives the privilege "upon payment of all arrears, with interest thereon not to exceed six per cent. per annum," etc., while the statute gives the privilege "upon the payment of all overdue premiums and any other indebtedness to the company upon said policy, with interest at the rate of not exceeding six per cent. per annum." Under the statute, all loans and other indebtedness must be paid. Under this form of policy, if the arrears of premiums are paid, it is unnecessary to pay the other indebtedness to the company. Everything secured to the insured by the statute is secured by this language. The chief objection of the commissioner was that the other indebtedness is not expressly referred to in the form. But we think the meaning is clear, and that the form is sufficient.

The statute calls for a table upon or attached to the policy, "showing in figures the loan values, if any, and the options available under the policy each year, upon default in premium payments," etc. The table in the petitioner's form shows the "cash surrender value" accurately, the column being headed with those words. Just before the table, under the head "loans," in large type, is a statement that "At any time while

* The language of the provision in the policy of the New York Life Insurance Company was as follows: "Incontestability. This policy shall be incontestable, except for non-payment of premiums, from its date."

The provision in the policy of the Mutual Benefit Life Insurance Company on the same matter was: "Incontestability. If within one year the insured shall commit suicide, while sane or insane, this policy will be null and void. This policy will be incontestable after one year except for non-payment of premium."

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this policy is in force, the company will loan up to the limit secured by the cash surrender value," etc. We are of opinion that the table, with the accompanying statement, sufficiently shows the loan value.

For reasons already stated in this opinion and in the *Ætna Life Ins. Co.* v. *Hardison*, *ante*, 181, the form is defective in not containing a provision that the contract includes the application, as well as the policy, and also a provision that no statement made by the insured shall be used in defense to a claim under the policy, unless it is contained in a written application and a copy of the application is indorsed upon or attached to the policy when issued. The policy holder is entitled to have the agreement in the policy substantially as it is stated in the provision. Not only the legal effect of the contract, but the character of it, should be stated in the policy. This clause of the statute should be construed strictly. In former cases, under the R. L. c. 118, § 73, where the conditions were peculiar, applications were admitted in evidence, notwithstanding certain safeguards for the insured which were less strict than some of those furnished by this statute. *Holden* v. *Prudential Ins. Co.* 191 Mass. 158. *Moore* v. *Northwestern Ins. Co.* 192 Mass. 468. *Paquette* v. *Prudential Ins. Co.* 193 Mass. 215. *Holden* v. *Metropolitan Ins. Co.* 188 Mass. 212. *Reagan* v. *Union Ins. Co.* 189 Mass. 555.

In the first of the cases before us, a gentleman of the bar appeared as *amicus curiae*, by leave of the court, representing parties interested in the decision that might be made upon the construction and effect of the statute, and presented a brief suggesting that the section under which the petitions are brought is unconstitutional. The parties who invoke the aid of the court are precluded from making this contention, (*Pitkin* v. *Springfield*, 112 Mass. 509,) and the respondent does not desire to make it. It is a general rule that the court will not consider the constitutionality of a statute upon an objection made by persons whose rights are not affected by it, and usually the parties to the suit are the only ones who are permitted to raise such a question. But where, as in this case, the jurisdiction of the court depends entirely upon the validity of the act, and the attention of the court is brought to that fact by persons interested in the effect

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to be given to the statute, although not interested in the case before the court, we deem it our duty to consider whether we have jurisdiction, before taking affirmative action. Action of a court that has no jurisdiction is void. *Belcher* v. *Sheehan*, 171 Mass. 513.

The first suggestion is that the Legislature could not give the insurance commissioner power to pass upon the forms of policies to be issued, and, especially, could not provide that an insurance company should be liable criminally for issuing a policy in a form not approved by him. Secondly, it is suggested that jurisdiction could not be given to this court to review the action of the insurance commissioner in a case of this kind.

The insurance commissioner is an administrative officer. The Legislature prescribed the requirements in the forms of policies. It did not see fit to prescribe a standard form for life insurance companies, but stopped with an enactment of substantive provisions for all policies. It was proper to leave to the insurance commissioner the management of details in the administration of the law. It was proper to prohibit the use of policies that did not conform to the law, and to punish disobedience on the part of an insurance company. It was a reasonable regulation to require companies to submit the forms of policies to the insurance commissioner before using them, so that he could see whether the law was being obeyed. His duty was to approve of every form of policy that seemed to him correct. The insurance companies, after submitting their forms to him, had nothing to do but to go on with their business, unless he made objection within thirty days. If he made such objection, they were given a right to bring a suit in this court for the determination of the question whether their proposed action was within the law.

With the power of regulation of the business of insurance, and of the conduct of corporations, domestic and foreign, belonging to the Legislature, it seems to us plain that such companies may be forbidden to issue policies that are deemed contrary to law by an administrative officer, until the court can determine the legal questions involved. The insurance commissioner cannot decide finally, nor exercise any judicial power in the premises. In these cases, the companies failed to satisfy an administrative officer, acting for the protection of the public, that they were proceeding

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legally. The statute declares that, thereupon, they shall do no more business until there is a judicial determination of their rights by this court. This part of the case is covered by the decision in *Provident Savings Society* v. *Cutting*, 181 Mass. 261, and there are many other cases in which authority somewhat like this is held to have been rightly exercised by public officers. *Insurance Co.* v. *Wilder*, 40 Kans. 561. *State* v. *Moore*, 42 Ohio St. 103. *Brodbine* v. *Revere*, 182 Mass. 598. *Commonwealth* v. *Sisson*, 189 Mass. 247.

The authority for a so called review by this court is simply a provision for an original judicial proceeding which an insurance company may bring before a court of law, to ascertain whether its action in establishing the form of its policy is legal. The party on one side is the company, the party on the other side is the insurance commissioner representing the public. It is a convenient and proper method of settling the rights of the company and of the people, by a regular trial of the disputed question whether the company, in its plan for conducting its business, is within the statute. There is no reason why the Legislature should not provide such a judicial tribunal for such a purpose. See St. 1890, c. 304. *Employers' Liability Assurance Corp.* v. *Merrill*, 155 Mass. 404. *Janvrin, petitioner*, 174 Mass. 514. *Moynihan's appeal*, 75 Conn. 358. We see no constitutional objection to this part of the act.

We need not discuss at length the other constitutional questions raised. We have assumed already that the Legislature has large powers for the regulation of the business of insurance. It may act under the police power for the protection of the public, or it may act as the creator and controller of corporations, domestic and foreign, which are subject to this power. This has been decided in many cases in this Commonwealth and elsewhere. The following are some of the decisions that rest mainly on the first ground: *Commonwealth* v. *Roswell*, 173 Mass. 119. *White* v. *Provident Savings Assurance Society*, 163 Mass. 108. *Kidder* v. *United Order of the Golden Cross*, 192 Mass. 326. *Cutting* v. *American Ins. Co.* 197 Mass. 181. *Considine* v. *Metropolitan Ins. Co.* 165 Mass. 462. *Chicago Ins. Co.* v. *Needles*, 113 U. S. 574. *Hancock Ins. Co.* v. *Warren*, 181 U. S. 73, 75, 76. *Equitable Life Society* v. *Clements*, 140 U. S. 226, 233. *Common-*

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wealth v. *Vrooman*, 164 Penn. St. 306. *Fidelity Mutual Life Association* v. *Ficklin*, 74 Md. 172. *Leavenworth* v. *Booth*, 15 Kans. 627. Some of the decisions that rest mainly on the second ground are the following: *Oliver* v. *Liverpool & London Ins. Co.* 100 Mass. 531. *Opinion of the Justices*, 97 Maine, 590. *Dedham Bank* v. *Chickering*, 4 Pick. 314. *Fidelity Mutual Life Association* v. *Mettler*, 185 U. S. 308. *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557. *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28, 43. *Security Ins. Co.* v. *Prewitt*, 202 U. S. 246, 257.

The right of the Legislature to prescribe a standard form of policy has been assumed in many cases. *Quinn* v. *Fire Association*, 180 Mass. 560. *Hewins* v. *London Assurance Co.* 184 Mass. 177, 183. *Boyden* v. *Massachusetts Masonic Association*, 167 Mass. 242. *Quinlan* v. *Providence Ins. Co.* 133 N. Y. 356, 365. *King* v. *Concordia Ins. Co.* 140 Mich. 258. *Dowling* v. *Lancashire Ins. Co.* 92 Wis. 63. *Anderson* v. *Manchester Ins. Co.* 59 Minn. 182. *O'Neil* v. *American Ins. Co.* 166 Penn. St. 72. We see no reason to doubt the constitutionality of the statute.

In each of the cases the form of the policy was incorrect in the particulars hereinbefore stated, and the petitioners are not entitled to relief under their petitions.

So ordered.

PERCY A. ATHERTON, trustee, *vs.* HENRY P. EMERSON.

Suffolk. March 17, 18, 1908. — June 8, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Equity Pleading and Practice, Exceptions to master's report, Bill. *Evidence*, Remoteness, Presumptions and burden of proof, Circumstantial. *Witness*, Refreshing recollection. *Bankruptcy*, Preference. *Corporation*, Officers and agents. *Fraud*. *Equity Jurisdiction*.

Upon a reservation by a single justice of this court for consideration by the full court of exceptions to findings of fact contained in the report of a master to whom a suit in equity was referred, the report containing all the evidence introduced before the master, such findings will not be revised unless they are plainly wrong, although upon some of the issues the full court might not have come to the same conclusions as were reached by the master.

At the hearing before a master of a bill in equity by the trustee in bankrupcty of a

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corporation against one who was president, treasurer, general manager and a member of the board of directors of the corporation, to recover the value of property alleged to have been conveyed by the corporation to the defendant by way of preference, it appeared that an involuntary petition against the corporation, seeking to have it adjudged bankrupt, was filed on March 16, 1904, and that appraisers appointed by the bankruptcy court appraised the assets of the corporation on April 11, 1904. A material question was whether the corporation was insolvent on December 10, 1903, and the plaintiff offered as evidence to prove such insolvency the testimony of the appraisers as to what was the value of the property which they had seen and examined. The master admitted the evidence, and stated in his report that it was of slight probative value but was enough "to turn the scale," and the defendant excepted. *Held*, that the evidence might have been found by the master not to be too remote under the circumstances, and that the exception therefore must be overruled.

Two of three appraisers, who had been appointed by the bankruptcy court to appraise the estate of a bankrupt and had filed their report, were called by the plaintiff to testify at a hearing before a master of a bill in equity where such value was a material fact, as to the value of the property at the time of the appraisal. One of them, being handed a certified copy of the report of the appraisers, which the master expressly said was to be used only to refresh the recollection of the witnesses, stated that the amounts in the copy were correct, and then stated what the amounts were. The other witness stated that he could not remember what the value was, but that it was as stated on the certified copy of the appraisers' report. The certified copy then was offered in evidence and admitted "as being an attested copy of the appraisal of these men appointed by the court." The third appraiser was not called. The defendant excepted to the admission of the certified copy of the report of the appraisers in evidence. A single justice of this court, before whom the exception was heard, reserved the case for consideration by the full court. *Held*, that, while neither the original nor a certified copy of the appraisal was admissible as in itself evidence of the value of the property appraised, it did not in this instance appear to have been offered or admitted as such evidence, but merely as a statement of the evidence intended to be given by the second witness; and that therefore there was no error in its admission.

A petition was filed on March 16, 1904, in the bankruptcy court against a corporation seeking to have it adjudged a bankrupt, and, because the petition was contested and the adjudication and the appointment of a trustee were thereby delayed, the court appointed a receiver to take charge of the assets in the meantime. The receiver, after reasonable efforts to get the highest price obtainable for the assets, sold them to one who had been the president, treasurer, general manager and a member of the board of directors of the corporation. At the hearing before a master of a bill in equity by a trustee in bankruptcy of the corporation, who was afterwards appointed, against him who had been president, treasurer, general manager and a member of the board of directors of the corporation, to recover the value of certain property conveyed to the defendant by way of preferences by the corporation before the filing of the petition, testimony as to the amount for which the assets were sold by the receiver to the defendant was admitted as evidence on the question of what the value of the assets was, and the defendant excepted. *Held*, that the evidence was not too remote, and was admissible.

Exceptions to the rulings of a master, to whom a suit in equity has been referred, upon the admissibility of evidence not plainly affecting his conclusions upon the real merits of the suit, are not readily to be sustained.

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Both the intent of a debtor to make the preference referred to in § 60, a, b, of the bankruptcy act of 1898, as amended by U. S. St. 1903, c. 487, and the reasonable cause on the part of the creditor to believe that such preference was intended, may be shown by circumstantial evidence in a suit brought by the trustee to recover the property so transferred or its value.

From evidence before him at the hearing of a suit in equity by the trustee in bankruptcy of a corporation against one who had been president, treasurer, general manager and a member of the board of directors of the corporation, to recover the value of property alleged to have been conveyed to the defendant by the corporation as a preference under § 60, a, b, of the bankruptcy act of 1898, as amended by U. S. St. 1903, c. 487, a master to whom the suit had been referred found that, without evidence which was introduced before him of the value assigned to the corporation's assets by appraisers appointed in the bankruptcy proceedings, and of the amount for which a receiver who was appointed in those proceedings had sold the assets to the defendant, the probative weight of which evidence he found was "light," he would "not have found that the corporation was insolvent" at the time the alleged preference was made, or that the defendant had reasonable cause to believe it to have been insolvent and that it intended to give him a preference; but he also found that, at the time the conveyance was made, the defendant had reasonable cause to believe that the corporation was insolvent and intended to prefer him, since a state of things then existed and then was known by the defendant, which, if known by a business man of ordinary prudence and intelligence, would have caused him to believe that the corporation was insolvent and intended to give a preference. And he ruled that the defendant should return to the plaintiff the value of the property conveyed. *Held*, that, upon the facts found, there was no error in the ruling.

One who was president, treasurer, general manager and a member of the board of directors of a corporation, and also was engaged in a business similar to that in which the corporation was engaged, was, at a time within four months of the filing of a petition to have the corporation adjudged bankrupt, (upon which an adjudication afterward was made,) an indorser upon notes of the corporation and knew that the corporation was insolvent, but, knowing that the corporation intended to prefer him, he accepted from the corporation a deed of certain of its property and of its book accounts, which purported to be in consideration of loans to be made in the future, but which was made in part at least to secure past indebtedness of the corporation to him. He also received in the same period and under the same circumstances payments of balances due him from the corporation in excess of what he owed it. In a suit in equity brought against him by the trustee in bankruptcy of the corporation to recover the value of the property thus conveyed, the amount collected on the book accounts, and the payments to him on his account with the corporation, it was *held*, that the transactions were preferences under § 60, a, of the bankruptcy act of 1898 as amended by U. S. St. 1903, c. 487, and that, under § 60, b, the trustee might avoid them, and recover from the defendant the value of the property of the corporation thus conveyed and paid to the defendant.

One who was the president, treasurer, general manager and a member of the board of directors of a corporation, an indorser upon a promissory note of which it was the maker and a guarantor of certain of its bills payable, knowing that the corporation was insolvent and that it intended, in preference to other creditors, to relieve him from his liability as such indorser and guarantor, himself as treasurer of the corporation paid the note at its maturity and the account which he

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had guaranteed, at a time within four months of the filing in the bankruptcy court of a petition that the corporation be adjudged bankrupt, upon which an adjudication afterwards was made. Neither the payee of the note nor the creditor thus paid had reason to believe that a preference was intended by the payment. *Held*, that such payments were preferences within the meaning of § 60, a, of the bankruptcy act of 1898, as amended by U. S. St. 1903, c. 487, and that, under § 60, b, the trustee in bankruptcy could recover in a suit in equity against the indorser and guarantor, as one who was "benefited thereby," the amount of the payments.

Upon a reservation by a single justice of this court for consideration by the full court of an exception to a ruling of a master, to whom a suit in equity had been referred, in which he refused to allow a certain claim of the plaintiff on the ground that the allegations of the bill were not broad enough to include the claim, such exception must be sustained if it appears that the defect in the allegation in the bill was one which might have been taken advantage of by demurrer or one that might have been cured by a merely formal amendment, and if, on the facts as found by the master, the plaintiff was entitled to relief.

In a suit in equity by the trustee in bankruptcy of a corporation against one who had been its president, treasurer, general manager and a member of its board of directors, to recover the value of certain alleged preferences received and profits made by him in violation of his official duties, it appeared that, at a time within four months of the filing of the petition in bankruptcy, the defendant, knowing of the corporation's insolvency, purchased a claim from a creditor at less than its face value, and then as treasurer paid himself its full face value. A master to whom the suit was referred ruled that the plaintiff could recover, but that his recovery was limited to the profits the defendant made on the transaction, and both the plaintiff and the defendant excepted. *Held*, that both exceptions must be overruled, since the master might have found that the defendant in purchasing the claim was acting as agent of the corporation; *but*, that, if the master had found that in making the purchase the plaintiff had been acting for himself and not on behalf of the corporation, the entire amount paid to him in settlement of the account might have been recovered by the plaintiff as a preference under § 60, a, b, of the bankruptcy act of 1898 as amended by U. S. St. 1903, c. 487.

A master, to whom was referred a suit in equity brought by the trustee in bankruptcy of a corporation against one who was its president, treasurer, general manager and a member of its board of directors, to recover an amount of money alleged to have been paid to the defendant as salary in excess of the fair value of the services of the defendant to the corporation, found that, by a vote of the directors of the corporation shortly after its organization, the defendant was to receive annually as salary a sum equal to $5,000 and six per cent of the amount of capital invested by him, and that the other officers were to receive as their salaries certain amounts and like percentages of the capital invested by them; that subsequently, as from time to time he acquired additional shares of the capital stock of the corporation, the directors voted to the defendant as additions to his salary amounts equal to six per cent of the par value of the stock thus acquired by him; that a fair value of the services of the defendant to the corporation was $5,000; that the corporation never had declared any dividend, *eo nomine*. *Held*, that the plaintiff was entitled to recover all sums in excess of $5,000 per year paid to the defendant as salary, *but* that it could not be ruled as a matter of law that such voting of salaries amounted to a declaration of a dividend.

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BILL IN EQUITY, filed in the Supreme Judicial Court for the county of Suffolk September 18, 1905, by the trustee in bankruptcy of the Eastern Commission and Importing Company, seeking to recover from the defendant the amount and value of certain payments and transfers of property alleged to have been made by the company by him, while he was its president, treasurer and general manager, as unlawful preferences under the national bankruptcy act.

The case was referred to a master, who filed a report and, with it, a transcript of all the evidence introduced before him, which filled nine hundred and thirty-six pages of the printed record.

It appeared that a creditor's petition was filed in the District Court of the United States for the District of Massachusetts, to have the corporation adjudged a bankrupt, on March 16, 1904. The petition was contested by certain attaching creditors, and, in consequence of this contest, the corporation was not adjudged a bankrupt until March 16, 1905.

The master found and reported that the plaintiff was entitled to recover from the defendant

The value of warehouse receipts for merchandise stored by the Quincy Cold Storage Company . .	$8,629.48
Amount collected on certain choses in action . . .	4,652.92
Preferential payments of money by the corporation to the defendant on open account	1,771.87
Profits of the purchase by the defendant of the accounts of the Daisy Mfg. Co. and Leo Schlessinger and Co.	510.33
Salary paid to the defendant in excess of a fair compensation for services rendered	9,344.81
Moneys paid to payees of notes indorsed by the defendant	51,000.00
A total of	$75,909.41

And he refused to rule that certain sums paid by the corporation, as stated in the opinion, upon certain of its accounts which the defendant had guaranteed, should be paid to the plaintiff by the defendant.

That part of the record which has reference to the admission

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in evidence of the certified copy of the bankruptcy appraisal, referred to in the opinion, is as follows:

Q. (of the witness Hatch in direct examination). "Now, can you give us what was a fair value of the assets?" A. "I should think that was." — Q. "And will you give it to us?" A. (looking at the paper handed to him by the plaintiff's counsel). "This, I understand, is a copy of the appraisal that we turned in? Will I just read the amounts?" — Q. "If those are right?" A. "I should say they were. It is some time since I have seen these figures, it is two years or more; it says —"

Defendant's Counsel: "I object." The Master: "You are proposing to give me the figures, aren't you?" Plaintiff's Counsel: "Yes." The Master: "What is your objection?" Defendant's Counsel: "My objection is he is not answering the question. He says he cannot tell anything about it, it is two years ago, and he starts off to read a paper." Plaintiff's Counsel: "I have shown him a certified copy of his appraisal." Defendant's Counsel: "I do not know what it is." Plaintiff's Counsel: "I will show it to you." Defendant's Counsel: "I don't care anything about it."

Q. (by the plaintiff's counsel). "I am showing you, Mr. Hatch, something to refresh your recollection, a certified copy of your appraisal as it was filed in the bankruptcy court" — The Master: "I think the certified copy itself is admissible." Plaintiff's Counsel: "I am going to offer it." The Master (to the witness): "You filed your appraisal in court?" A. "Yes, sir." — Q. "Now, can you give us the value that you put on?" A. "This certified copy says [reading therefrom]. . . ." — Q. "Those were fair values of the articles that you appraised?" A. "In our judgment." . . .

Q. (of the witness Mason in direct examination). "You may look at that paper and then tell us what were the fair values of the articles that you appraised there, or the stocks that you appraised." A. "I do not see why I should have to answer that, it is here, isn't it?" — Q. "We want to get it on the record?" A. "I really don't catch the idea." — Q. "Will you tell us after the appraisal you made what were the values, or fair values, of the articles you appraised?" A. "After I appraised them?" — Q. "Yes." A. "You mean —" — Q. "At that

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time." A. "You mean the bulk of the stock?" — Q. "Yes." A. "I really don't remember what the stock amounted to; whatever is here, I suppose." — Q. "Now, refreshing your recollection from that, tell us?"

The Master (addressing defendant's counsel): "You object to using that paper as strictly refreshing his recollection?" Defendant's Counsel: "I don't know anything about the paper."

The Master (addressing plaintiff's counsel): "You can show what the report was by the certified copy. You have shown he was appointed by the court and made an appraisal. I think now you may introduce a certified copy to show what it is." Plaintiff's Counsel: "You will exclude that question?" The Master: "I think I better. He can use that paper strictly to refresh his recollection." Plaintiff's counsel: "Then let me take an exception."

Q. (of the witness). "The values which you put on your appraisal which you returned to the court were fair values?" A. "That is what I thought, yes."

Plaintiff's Counsel: "Then I will offer this certified copy as being the return he made to the court." The Master: "How many appraisers were there?" Plaintiff's Counsel: "Two anyway." The Master: "I will receive that paper when you show by another one of the appraisers, — are you going to call the other?"

Q. (of the witness). "Was there a third appraiser?" A. "I think so, three of us." — Q. "Was that Mr. Edward Hatch?" A. "Hatch is one. I don't remember the other. The other was a lawyer." — Q. "Will you look and see if you remember his name?" A. "I do not remember. I could remember him if I saw him, I don't remember his name."

Plaintiff's Counsel: "I offer that." The Master: "I will receive that as being an attested copy of the appraisal of these men appointed by the court." Defendant's Counsel: "That I want an exception to."

The copy of the appraisal thus introduced in evidence showed the appointment by the judge of the District Court of the United States for the district of Massachusetts of Reginald C. Heath of Brookline, and Edward Hatch and Mark Mason of Boston to act

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as appraisers, their oath to faithfully perform their duty, and the following statement signed by them on April 11, 1904: "We, the undersigned, having been notified that we were appointed to estimate and appraise the real and personal property aforesaid, have attended to the duties assigned us, and after a strict examination and careful inquiry, we do estimate and appraise the same as follows:

Stock and merchandise in store 69 Bedford St. Stock and merchandise in storage. Partly pledged as collateral	$16,650.00
Cash on hand	124.56
Fixtures and office furniture	500.00
Accounts receivable. Partly pledged as collateral	22,000.00
Merchandise in hands of H. P. Emerson & Co. pledged as collateral	1,140.25
	$40,414.81"

The findings of the master with reference to the defendant's salary were in substance that, at the organization of the corporation, it was agreed and voted that the defendant should have a salary of $5,000 per year and six per cent of the capital contributed by him, and that others of the officers should have salaries similarly computed. Subsequently, as from time to time he gained control of additional shares of the capital stock of the corporation, there were votes of the directors that his salary be increased by an amount equal to six per cent of the par value of such additional stock. "The evidence as to the fair value of Mr. Emerson's services as treasurer and general manager is not satisfactory. It appeared by the evidence that during the time that he had been in business for himself that his profits had considerably exceeded his salary which the company agreed to pay him. These profits, however, included not only compensation for services but capital employed in his business. Considering Mr. Emerson's absence on his trip around the world and all the circumstances of the case, I find that an annual salary of $5,000 is a fair compensation for services rendered by Mr. Emerson to the company. . . . He has drawn, therefore, $9,844.81 in excess of a reasonable compensation of

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services rendered to the company. The votes authorizing contracts for salaries for Mr. Emerson and the other stockholders of the Eastern Commission and Importing Company did not purport to be votes making or declaring dividends, and cannot be so construed. These votes were only means of fixing salaries and enabling the employees of the company to reach some agreement as to their annual salaries. No dividends *eo nomine* were ever made or declared by the corporation."

Other material findings and rulings by the master are stated in the opinion. Both parties excepted to the report. The substance of the exceptions, of which there were ten by the plaintiff and one hundred and two by the defendant, is stated in the opinion.

There was a hearing before *Sheldon*, J., who reserved the case for consideration by the full court.

E. A. Whitman & L. M. Friedman, (*H. W. Barnum* with them,) for the plaintiff.

E. R. Anderson, (*A. T. Smith* with him,) for the defendant.

SHELDON, J. The plaintiff is the trustee in bankruptcy of the Eastern Commission and Importing Company, a corporation organized under the laws of New Jersey, but carrying on its business in this Commonwealth. The defendant was the president, treasurer, general manager and a director of the company. The bill is brought to recover from the defendant the amount and value of certain payments and transfers of property claimed to have been made to him by the company as unlawful preferences under the national bankruptcy act and also in violation of its charter and by-laws and of his official duties. U. S. St. 1898, c. 541. The master to whom the case was referred has sustained most of the contentions of the plaintiff; and if his report shall be confirmed, the plaintiff will be entitled to recover a large sum from the defendant. It will therefore be convenient in the first instance to consider the contentions made by the defendant upon the report and those of his exceptions to the report which are now insisted upon by his counsel.

It may be premised, however, that, so far as these exceptions are based upon the claim that the master's findings upon questions of fact should upon the evidence have been other than they were, we have not found that they were well taken. The

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familiar rule that the master's findings cannot be set aside or reversed unless it is shown that they are plainly wrong, is especially applicable in a case where the testimony was so voluminous and the controverted questions so many and so earnestly disputed as is shown by the record before us. Applying that rule, a careful examination of the evidence does not show such error in any of the findings as to make it our duty to set them aside. It may be that upon some of the issues presented we should not have come to the same conclusions as those which the master has reached; but we cannot say that any of them are plainly wrong. Nor would it serve any useful purpose to go over in detail the evidence upon any of these questions. As to the questions of law which have been discussed in the elaborate arguments of the parties, we will consider them in connection with the findings of the master.

One of the fundamental questions arises upon the finding of the master that on December 10, 1903, the company was insolvent within the meaning of the bankruptcy act, that is, that its liabilities then exceeded a fair valuation of all its property. Bankruptcy Act, § 1. *Pirie* v. *Chicago Title & Trust Co.* 182 U. S. 438. *Churchill* v. *Wells*, 7 Coldw. 364. *In re Hines*, 144 Fed. Rep. 142. The master also found that all payments of money and transfers of property made by the company to the defendant after that date were intended to give him a preference, and that he had reasonable cause to believe that the company was insolvent and intended to give him a preference. But the master admitted upon these issues evidence of the values of the company's assets as estimated by the appraisers appointed in the bankruptcy proceedings, together with evidence as to purchases and sales made by the company in the intervening time and the condition of the stock, for the purpose of showing the market value of the goods in early December, 1903; and he has reported that "though the probative weight of this evidence was light, it was sufficient to turn the scale," and that without it he "should not have found that the company was insolvent within the meaning of the bankruptcy act on December 10, 1903," and that the defendant had reasonable cause to believe the facts above stated.

It appears by the report of the evidence that in the bank-

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ruptcy proceedings against the company three appraisers, Messrs. Heath, Hatch and Mason, were appointed to appraise its property, and that they did so on April 11, 1904, and returned their appraisal to court. Two of these appraisers were called to testify as to the value of the property which they had seen and examined. The first witness, Hatch, was asked to state what in his judgment was the fair value of the property, and to refresh his recollection in answering from a certified copy of the appraisal made by himself and his associates. He answered that the amounts stated in that certified copy were correct, and then stated what those amounts were. Mr. Mason, after some general testimony as to the character of the stock, was shown the same certified copy, and was asked what were the fair values of the articles appraised. In substance he answered that he could not remember, that it was as stated on the paper shown him, i. e., the certified copy of the appraisal which he had joined in making. The defendant's counsel, in answer to a question from the master whether he objected to the witness's using that paper as strictly refreshing his recollection, answered, "I don't know anything about the paper." The witness then said in answer to a further question, whether the values put upon the appraisal which was returned to the court were fair values, "That is what I thought, yes." Thereupon the certified copy of the appraisal was offered in evidence, and admitted, "as being an attested copy of the appraisal of these men appointed by the court." The third appraiser was not called.

These two witnesses might well be found to have themselves sufficient acquaintance with such articles to testify about their value. The evidence as to the value of the property in April, 1904, might be found not to be too remote to bear upon its value in December, 1903, especially in view of the other evidence in the case. *In re Elmira Steel Co.* 109 Fed. Rep. 456. There is no doubt, however, that under our decisions neither the appraisal itself nor a certified copy thereof was competent as in itself evidence of the value of the property appraised. *Kafer* v. *Harlow*, 5 Allen, 848. *Adams* v. *Wheeler*, 97 Mass. 67. *Bradford* v. *Cunard Steamship Co.* 147 Mass. 55. It was not made by the defendant, nor was he privy to it, as in *Sanborn* v. *Baker*, 1 Allen, 526, *Leighton* v. *Brown*, 98 Mass. 515, 516, *Wright* v.

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Quirk, 105 Mass. 44, and *Brigham* v. *Evans*, 118 Mass. 538. But it does not appear that this paper was admitted as itself furnishing any evidence. The master had expressly said that it was to be used only to refresh the recollection of the witness. But the witness Mason would go no further than to say in substance that the values stated on the paper were in his opinion the fair values of the articles. Under these circumstances, we cannot say that the master might not admit the paper, as being in reality a statement of the testimony of the witness. *Roswald* v. *Hobbie*, 85 Ala. 73. It is difficult to determine exactly what was meant by everything that was said between the master, the counsel on each side, and the witness; but, taking the statement of the evidence and the language of the report together, we cannot say that it appears that this paper was received or treated by the master as itself furnishing any evidence of the value of the articles appraised, or as being anything more than a statement of the evidence intended to be given by the witness Mason; and accordingly the defendant's exception to its admission cannot be sustained.

Evidence that the assets, after the appraisal and after reasonable efforts, were sold by the receiver in bankruptcy to the defendant for $36,000, on April 16, 1904, was competent on the question of their value. The sale does not appear to have been too remote, and it was made to the defendant himself, by an officer of the court, whose duty it was to get the highest price obtainable, and who had made reasonable efforts for that purpose. The defendant concedes that a price obtained at a sale by auction is some evidence of value. *Brady* v. *Finn*, 162 Mass. 260, 267. *Baker* v. *Seavey*, 163 Mass. 522. The price obtained at a sale like this cannot be less competent upon the question of value than if the sale had been a forced one to the highest bidder, as in *Brady* v. *Finn*, *ubi supra*. And see *Kent* v. *Whitney*, 9 Allen, 62. *Newsome* v. *Davis*, 133 Mass. 343. *Ridge Avenue Bank* v. *Studheim*, 145 Fed. Rep. 798. The very ground of the rule that the value of real property may be shown by evidence of actual sales of similar property is that such sales, whether public or private, are a trustworthy guide to the value of the property sold. *O'Malley* v. *Commonwealth*, 182 Mass. 196.

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The testimony of what was said and done by the defendant or by others with his knowledge was competent, in connection with the evidence of the course of business of the corporation, to show his connection with that business, his acquaintance with what was done, his control of its affairs so far as he had such control, and his knowledge of the condition of its affairs and of its impending insolvency. And as one step towards establishing the liability of the defendant, it was competent to show the financial standing of the company and its actual insolvency four months before the beginning of the bankruptcy proceedings. We cannot find that the master erred as to these matters in admitting any of the evidence complained of. *In re Englefield Colliery Co.* 8 Ch. D. 388, 401. Exceptions to the rulings of a master upon the admissibility of evidence not plainly affecting his conclusions upon the real merits are not readily to be sustained. *American Circular Loom Co.* v. *Wilson*, 198 Mass. 182. *Long* v. *Athol*, 196 Mass. 497.

The master's finding that the defendant had reasonable cause to believe that the company was insolvent and intended to give him a preference was based upon his ruling that this meant the existence of a state of things which, if known by a business man of ordinary prudence and intelligence, would cause him to believe that the bankrupt was insolvent and intended to give a preference. This ruling was correct. *Allen* v. *French*, 178 Mass. 539. *Buchanan* v. *Smith*, 16 Wall. 277. *In re Pfaffinger*, 154 Fed. Rep. 523. And see the cases collected in 5 Cyc. 370. But the defendant argues that, as the master has stated that he could not himself have found the insolvency of the company and the defendant's reasonable cause to believe this fact and that a preference to him was intended, without taking into account the appraised value of the company's assets and the amount realized upon the sale to the defendant in April, 1904, so the defendant, who could not have known these things in December, 1903, before they took place, cannot be charged with a knowledge and a reasonable cause of belief which the master could not then have found. This contention however rests upon a misconception of the master's report. He has found that the defendant was fully acquainted from the first with the business of the company, and had actually reasonable

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cause to believe that it was insolvent and intended to give him a preference. The subsequent occurrences that have been stated were merely evidence which, in connection with other evidence, showed to the master the actual insufficiency of its assets to pay its debts. They were subsequent actions which showed the prior condition of insolvency. It by no means follows, simply because the master could not have found that prior condition without them, that the defendant, with his greater knowledge of the company's affairs and of the real value of its stock in trade and choses in action, had not the reasonable cause of belief which the master found that he had. Many of the facts found by the master, taken by themselves, were not conclusive evidence, though known to the defendant, of its actual insolvency, or of the reasonable cause of belief on his part. Some of them, without more, would not even have warranted such a finding. *Pirie* v. *Chicago Title & Trust Co.* 182 U. S. 438. *Grant* v. *National Bank*, 97 U. S. 80. *In re Pettengill & Co.* 14 Am. Bankr. Rep. 757, 762. *Martin* v. *Bigelow*, 7 Am. Bankr. Rep. 218. But both the debtor's intent and the preferred creditor's reasonable cause of belief may be shown by circumstances. *Hardy* v. *Gray*, 144 Fed. Rep. 922, 926. *Deland* v. *Miller*, 11 Am. Bankr. Rep. 744. The defendant was not a stranger to the affairs of this company. As its president, treasurer and general manager, besides being a director, there was at least a presumption of fact that he knew of its actual financial condition. *Graham* v. *Middleby*, 185 Mass. 349, 356. *Hill* v. *Marston*, 178 Mass. 285, 286. To the same effect are *Clay* v. *Towle*, 78 Maine, 86, *James Clark Co.* v. *Colton*, 91 Md. 195, and *Consolidated Tank Line Co.* v. *Kansas City Varnish Co.* 45 Fed. Rep. 7, 11. The cases which hold that a director is not chargeable as matter of law with the exact knowledge of the business transactions of the corporation or the contents of its books and papers, are beside the point and need not be considered.

On the facts found by the master, the transfer of the merchandise stored in warehouse, made on January 16, 1904, and the assignment of the choses in action made February 1, 1904, were really made to secure past debts due to the defendant from the company. The proceeds of the notes indorsed by him on the last day were applied almost entirely to taking up the company's

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checks held by him; and it must now be taken that they were intended so to be applied. The fact that the papers purported to be either partly or wholly for loans to be made or for contemporaneous indorsements, cannot avail against the real transactions. If a part of the consideration had been for present or future loans or indorsements, but the transfers were made also to secure former indebtedness, we need not consider whether under the present bankruptcy act the transfer and assignment would have been wholly invalid as to this plaintiff. See *Bolster* v. *Graves*, 189 Mass. 301; *Hill* v. *Marston*, 178 Mass. 285; Bankruptcy Act, § 60 c; *Reed* v. *Helois Carbide Specialty Co.* 19 Dick. 231.

Accordingly we are of opinion that the master's finding in favor of the plaintiff for the two sums of $8,629.48 and $4,652.92, being the value of the goods in warehouse and the amounts collected by the defendant on the choses in action, respectively transferred and assigned to him as already stated, must be sustained; and for the same reasons the like finding for $1,771.87 for preferential payments of money made by the company to the defendant after November 16, 1903, must be sustained. We have not further considered whether the defendant can be held for such preferential payments during the interval between November 16, 1903,* and December 12 of the same year, because the master in dealing with the notes indorsed by the defendant and paid by the company has expressly found in the fifteenth paragraph of his report † that on the earlier as well as on the later of these dates the company was insolvent both technically and within the meaning of the bankruptcy act. It may be added that one of the results of the continued dealings of the defendant with the company is, as the master has found in the eleventh para-

* On this matter, the master found that the defendant "was doing business under the name of H. P. Emerson & Company and had continuous dealings with the company from its organization until early in March, 1904. After November 16, 1903, he collected from the company on account of his dealings $1,771.87 more than he gave it credit during the same time; and from December 16 to March 16 he collected $2,602.41 in excess of credits given to the company for the same time."

† The finding in the fifteenth paragraph of the report to which reference is here made was as follows: "The company paid the following notes which had been endorsed by Mr. Emerson, viz: —

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graph of his report,* that the defendant would be liable on this item for a greater amount than has been charged against him, if his liability were to be determined on December 12 rather than on the earlier date.

The company also paid at different dates on and after November 16, 1903, divers promissory notes of its own to the total amount of $51,000. Each of these notes had been indorsed by the defendant; and the circumstances, as found by the master, are such that, if the payments had been made directly to him, the plaintiff would have been entitled to recover the total amount thereof from him. But the payments were made directly to the holders of the notes, although he, as the indorser, was the person benefited by the payments, and it was the intention of the company to give him a preference by the payments, and he had reasonable cause to believe that the company was insolvent and intended to give him a preference. The payments were made by the defendant as treasurer of the company in its behalf, at the respective dates of maturity of the several notes, and of course before the inchoate liability of the defendant as indorser had become fixed by their non-payment and due notice to him. R. L.

Nov. 16, 1903	Colonial National Bank	note for	$2,500.00
Dec. 10, "	Mt. Vernon Nat'l Bank	" "	5,000.00
" 15, "	" "	" "	5,000.00
" 21, "	Colonial National Bank	" "	2,500.00
" 28, "	" "	" "	5,000.00
" 29, "	" "	" "	1,000.00
Jan. 1, 1904	" "	" "	5,000.00
" 5, "	" "	" "	5,000.00
" 11, "	" "	" "	5,000.00
" 15, "	" "	" "	5,000.00
" 21, "	" "	" "	5,000.00
Feb. 1, "	" "	" "	2,500.00
" 5, "	" "	" "	2,500.00
	Total		$51,000.00

" All of these payments were made by Mr. Emerson as treasurer in the company's behalf. The company at the time of each payment was technically insolvent and insolvent within the meaning of the bankruptcy act. Mr. Emerson was the person benefited by the payment of these notes. The company intended by each one of these payments to give Mr. Emerson a preference, and he had reasonable cause to believe that the company was insolvent and intended to give him a preference."

* This paragraph is quoted in the first footnote on the preceding page.

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c. 73, §§ 83, 106. There is no contention made that the holders of the notes had any reasonable cause to believe that a preference was intended to be given by their payment; and the trustee in bankruptcy, the present plaintiff, has no cause of action against them.

The national bankruptcy act provides in § 60, b, already referred to, that "if a bankrupt shall have given a preference . . . and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had" the reasonable cause of belief already mentioned, "it shall be voidable by the trustee, and he may recover the property or its value from such person." The defendant contends that the cause of action given by this section is only against the person who actually has received the preference, by receiving himself the money or property transferred, and that the words "or to be benefited thereby" were inserted in the statute only to meet the contingency of money or other property having been transferred to one who was not a creditor, but where a creditor was to receive the benefit thereof. He relies also on the provisions of § 57, i, of the bankruptcy act, that "whenever a creditor whose claim against a bankrupt is secured by the individual undertaking of any person fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor." He argues that, as a guarantor or indorser merely as such has no standing to make proof in his own name, but can prove only in the name of the creditor and can claim only upon his own payment to be subrogated to the rights of the original creditor, he is himself, especially where his liability has not yet become fixed, a mere stranger to the bankrupt estate, not having himself any of the rights of a creditor, and accordingly being incapable of receiving a preference or the benefit of a preference, and so not being liable to refund to the trustee in bankruptcy the amount of a payment made by the bankrupt to the creditor which cannot be recovered from the creditor himself, even though the payment was made for the purpose of relieving the indorser from a subordinate liability to the creditor which had not yet become fixed, and though it was intended to operate, as it has operated, for the relief of the indorser, and thus really to give

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him the benefit of a preference contrary to the provisions of the bankruptcy act.

In our opinion this is too narrow a construction of the statute. Its manifest purpose was to give a right of action against either the person who received the preference or the person who derived the benefit therefrom. In this case, the payments were really made by the defendant himself, though acting in his official capacity for the company; they were intended to operate for his benefit and to secure to him a preference by relieving him from the burden of the agreement which by his indorsement he had made to pay the notes if the company failed to pay them and certain further steps were taken by the holders. This object has been accomplished; he has secured relief from his agreement of indorsement, and has enjoyed the benefit of the preference intended. His case is within both the intent and the express words of the statute. This point was directly decided in *Kobusch* v. *Hand*, 156 Fed. Rep. 660. To the same effect are *Landry* v. *Andrews*, 22 R. I. 597, and *James Clark Co.* v. *Colton*, 91 Md. 195. Similar decisions were made under the bankrupt act of 1867. *Bartholow* v. *Bean*, 18 Wall. 635. *Ahl* v. *Thorner*, 3 N. B. R. 118. The decision made by the New York Court of Appeals since this case was argued, that under such circumstances the payment cannot be recovered back from the creditor to whom it was made, tends in the same direction. *Perry* v. *Van Norden Trust Co.* 192 N. Y. 189. We do not need here to consider the much controverted question, as to which there is at present in other courts an irreconcilable conflict of authority, whether the directors or other managing officers of an insolvent corporation have the right to prefer themselves to other general creditors, or whether they have become subject to such fiduciary obligations to the creditors, in addition to their original obligations as trustees for the stockholders, as to make it their duty to see that all the corporate assets are applied fairly to the payment of all corporate debts without availing themselves of their controlling power and superior means of knowledge to gain any advantage to themselves as creditors over other creditors of the corporation. We have here preferences which come within the prohibition of the bankruptcy act, and we confine ourselves to the case which is presented. Upon the findings of the master,

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the defendant is chargeable with the sum of $51,000, the amount of the notes in question.

The master refused to charge the defendant with the sum of $7,746.23, paid by the company, after November 30, 1903, to Ropke and Otto, upon an open account for which the defendant was liable as a guarantor. The circumstances were in other respects like those already stated with reference to the promissory notes indorsed by the defendant. The master's refusal was based solely upon his ruling that the allegations of the bill were not broad enough to cover this claim; and the correctness of this ruling is brought before us upon the plaintiff's exception.

The ruling was too strict. The sixty-ninth paragraph of the bill directly avers that the defendant "was an indorser upon the notes of the company and was otherwise obligated for its debts to a very large amount, being upwards of forty thousand dollars, and that, while said corporation was insolvent, and while this respondent knew or had reasonable cause to know such condition of insolvency, he, while the treasurer and managing director as aforesaid, and in fraud of the rights of, and violation of his duty to, the creditors of said corporation, and with the intent to prefer himself as a contingent creditor of said corporation, and in fraud of the bankruptcy act, did willfully neglect and refuse to pay all other creditors of said corporation than those on whose claims he was contingently liable as surety; did delay them in the collection of their claims and in suits thereon and in filing a petition in bankruptcy against said corporation until he had secured the payment of said notes and obligations from the funds of said corporation; all of which was done within four months previous to the filing of the petition in bankruptcy against said corporation: that said payments constituted fraudulent preferences within the meaning of the bankruptcy act, and should be repaid by this respondent to this complainant." And the eleventh prayer of the bill is "that the payments by this respondent set forth in paragraph sixty-ninth of the bill be declared fraudulent and void as preferences under the bankruptcy act of the United States, and this respondent be ordered to account for all sums so paid out of the treasury of said corporation." If it had been intended to insist upon the point that there was no direct aver-

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ment of the actual payment of these notes and other obligations, that claim should have been specially made by demurrer. If the objection had been made that the total recovery now sought under these averments was much in excess of the sum named, "upwards of forty thousand dollars," that objection might have been obviated by a merely formal amendment, and must now be taken to have been waived. In our opinion, the plaintiff's seventh exception to the master's report must be sustained, and the defendant must be charged with the further amount of this payment.

The master was warranted in charging the defendant with the profits made by him on the purchase of the accounts of the Daisy Manufacturing Company and Schlessinger and Company. He well might find that the defendant was acting for the company in these transactions, and so that he could hold the company only for the amounts actually paid by him. *Bulkley* v. *Whitcomb*, 121 N. Y. 107. *Higgins* v. *Lansingh*, 154 Ill. 301. *In re Imperial Land Co.* 4 Ch. D. 566. But for the same reason he cannot be charged with the full amount of these claims on the ground that their payment was an unlawful preference to him. If, however, we accepted the defendant's contention that he purchased these claims acting wholly in his own behalf, and not in any way for the benefit of the company, as he might have done, (*Glenwood Manuf. Co.* v. *Syme*, 109 Wis. 355; *Bradly* v. *Marine Phosphate Co.* 3 Hughes, 26,) we should be unable to avoid the conclusion that the subsequent payment of these claims to him by the company was an unlawful preference to him, and that he was chargeable with the full amount thereof.

The master has charged the defendant with a sum of more than $9,000 for the amount of salary received by him in excess of a fair compensation for services rendered. Upon his findings, we are of opinion that this was correct. *Union Pacific Railroad* v. *Credit Mobilier*, 135 Mass. 367, 376. *Kelley* v. *Newburyport & Amesbury Horse Railroad*, 141 Mass. 496, 499. *Nye* v. *Storer*, 168 Mass. 53, 55. *Fillebrown* v. *Hayward*, 190 Mass. 472, 478. *Raynolds* v. *Diamond Mills Paper Co.* 3 Robbins, 299. *Davis* v. *Thomas & Davis Co.* 18 Dick. 572. *Gardner* v. *Butler*, 3 Stew. 702. *Wayne Pike Co.* v. *Hammons*, 129 Ind. 368. It

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does not appear that there has been such a ratification of the action by which his salary was fixed as would be binding upon this plaintiff. *Von Arnim* v. *American Tube Works*, 188 Mass. 515, 518. We do not find it necessary to determine how far if at all the defendant's rights in this respect were limited by the law of New Jersey in consequence of the fact that the company was incorporated under the laws of that State. Nothing has been shown to increase his rights. We cannot say, however, that the master's finding, that the salaries as voted by the directors did not include dividends, was either wrong as matter of law or unwarranted by the evidence, though it well may be that we should have felt equally bound if a contrary finding had been made. And the ruling that what was done did not upon the findings made amount as matter of law to a declaration of dividends, was correct.

There is no occasion to discuss in detail the exceptions of either party not covered by what has been said, although they have all been carefully examined and considered. So far as they are material to the conclusions which we have reached, they ought not to be sustained.

The plaintiff's seventh exception to the master's report should be sustained; all the other exceptions of each party should be overruled; and a decree should be entered for the plaintiff for the sums found by the master and the further sum of $7,746.23, with interest upon the whole amount from the date of the filing of the bill.

So ordered.

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C. W. HUNT COMPANY *vs.* BOSTON ELEVATED RAILWAY COMPANY.

BOSTON ELEVATED RAILWAY COMPANY *vs.* C. W. HUNT COMPANY.

Suffolk. December 9, 1907. — June 9, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Contract, Construction, Performance and breach. *Interest. Damages. Practice, Civil*, Auditor.

In an action by a contractor against a street railway company, which was erecting on a wharf a large pocket for the storage of coal to be brought to the wharf in vessels, for a balance alleged to be due under a contract in writing to construct for the defendant in accordance with certain specifications two hoisting towers for hoisting coal from the vessels to the top of the pocket, it appeared that the contract contained the following provision: "The contractor agrees that all material furnished and work done hereunder shall be subject to acceptance by the railway company and its vice president; that all apparatus furnished and work done shall be subject at all times to the inspection of said vice president or his authorized agents, and that any work performed or material furnished which may be deemed by said vice president to be not in accordance with the terms of this contract and accompanying specifications shall be immediately replaced by the contractor at his own expense." The specifications provided that the work should be executed under the direction and supervision of the vice president of the railway company or his authorized representative, and that the vice president, "without relieving the contractor from any responsibility therein" reserved the right to direct the manner and order in which the work should be executed. The vice president executed the contract in behalf of the defendant and the correspondence which took place under the contract was conducted for the defendant by him. *Held*, that the vice president represented the defendant in the transaction and therefore was not in the position of a third person named as an arbitrator; consequently that the work was to be done to the satisfaction of the defendant, and, this being a business contract into which matters of personal preference did not enter, that, if the towers as built by the plaintiff were not satisfactory to the defendant's vice president, the plaintiff still could recover the contract price on showing that the towers were so constructed that they ought to have satisfied any reasonable man as a performance of the contract.

In an action by a contractor against a street railway company, which was erecting on a wharf a large pocket for the storage of coal to be brought to the wharf in vessels, for a balance alleged to be due under a contract in writing to construct for the plaintiff, by a certain date and in accordance with certain specifications, two hoisting towers for hoisting coal from the vessels to the top of the pocket, the contract required that the work should be done to the satisfaction of the defendant and its vice president acting as its representative. Six months after

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the first tower and five and a half months after the second tower should have been completed and in working order, the defendant's vice president sent to the plaintiff a letter stating that "Up to this time there is no indication that these towers are likely to prove in any degree adequate or satisfactory," complaining that the plaintiff's men had left the work and ending as follows: "Unless you proceed without further delay to complete your contract we shall be compelled to install an efficient apparatus at your expense." In answer the plaintiff wrote a letter asking the defendant to point out any feature of the contract not carried out. This resulted in interviews and correspondence in which the disputed matters were discussed under fourteen heads, until on the third day of a month, a month and a half after the beginning of the correspondence, the defendant's vice president wrote to the plaintiff as follows: "I now have your letter of 2nd inst. and am pleased to note that you now wish to immediately proceed with the completion of the towers in accordance with my letter of the 24th ult. We supposed you would do so immediately on receipt of that letter, nor was there anything in your subsequent letter of the 27th ult. which appeared to be in conflict with the work proposed to be done. We were therefore at a loss to understand your telegram of 1st inst. So far from holding up the work, we have demanded and do demand that you proceed forthwith to complete your contract. You mention a desire that we should, in acknowledging your letter, state that the work can proceed to completion without interruption. We have no desire whatever to interrupt the work, but we waive none of our rights under the contract to reject any or all of it if it proves unsatisfactory when completed." *Held*, that the last sentence above quoted reserved the defendant's right to accept or reject the work done under the contract as modified by the interviews and correspondence, and that defects which had not been pointed out and insisted upon at the time the last letter was written were waived.

In an action by a street railway company, which was erecting on a wharf belonging to it a large pocket for the storage of coal to be brought to the wharf in vessels, for alleged breaches of a contract in writing to construct for the plaintiff, by a date named and in accordance with certain specifications, two hoisting towers for hoisting coal from the vessels to the top of the pocket, one of the specifications was as follows: "The contractor guarantees that the apparatus furnished by him shall be ample and suitable in design and construction to perform the work as hereinafter specified, and that it shall be free from all defects in workmanship or material. He also agrees to furnish free of charge to the railway company any part proving defective in the apparatus or any part thereof within two years after date of complete installation in working order of said apparatus." Within two years after the date of installation, while hearings in the case were being had before an auditor, a crack appeared in the frame of the engine of each tower. The auditor found that these cracks came, not from a faulty design, but from some fault in the casting and that they constituted "a serious defect." It seemed that the plaintiff continued to use the engines after the cracks appeared. The engines were not in any way affixed to the land. *Held*, that, if the defect gave the plaintiff a right to reject the engines altogether, which was not passed upon, such right had been waived by the plaintiff's continued use of the engines. *Held, also*, that the specification above quoted gave the plaintiff the right to elect whether, on the discovery of such a defect within two years, it would call for a new part or would claim damages, and that the right to call for a new part was not an exclusive remedy.

The rule of *Foote* v. *Blanchard*, 6 Allen, 221, that a purchaser of goods for cash payable on delivery in case of non-payment is chargeable with interest from the

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date of delivery, is not applicable to an action on an account annexed containing forty-five items amounting to about $3,000, of which two items amounting to over $700 are for work done, three items amounting to more than $160 are for part of a bill of a person named, the nature of which does not appear, and sixteen items amounting to more than $50 are for freight. In such a case, if the plaintiff recovers, interest is due from the date of the writ only.

One who has been deprived of the use of his property contrary to the provisions of a contract, in suing for damages in an action of contract, is not precluded from recovering because the property in question commonly is not rented.

An auditor in assessing damages for a breach of contract is not bound to accept the testimony of an expert because it is the only evidence on the subject, but he is not justified in refusing to award any damages because he considers the estimate of the expert "obviously absurd." If he thinks the estimate too large, he can cut it down to the proper amount.

In an action by a street railway company, which was erecting on a wharf belonging to it a large pocket for the storage of coal to be brought to the wharf in vessels, for alleged breaches of a contract in writing to construct for the plaintiff, by a date named and in accordance with certain specifications, two hoisting towers for hoisting coal from the vessels to the top of the pocket, it appeared that one of the towers was not completed until more than nine months after it was required by the contract to be "completed and in working order" and that the other tower was not completed until about a month and a half later. Of these two periods of delay an auditor found that seven months in each case was the "inexcusable delay" of the defendant. It further appeared that during a portion of the period of delay there was a coal famine at the port in which the plaintiff's wharf was situated owing to a strike at the coal mines. The auditor did not find what portion of the period of delay was covered by the coal famine and the strike. The plaintiff had a power station at its wharf which used four thousand tons of coal a month, and had a storage capacity of three thousand tons, in addition to that of the coal pocket. The auditor found that the damages "were all attributable to the coal strike, which came without warning like a flood or tornado." He found and ruled that the damages suffered by the plaintiff were attributable to the coal strike and not to the failure of the defendant to perform its contract, and ruled that the plaintiff was not entitled to recover any damages. *Held*, that the ruling of the auditor that the plaintiff was entitled to no damages was wrong, and that the case must be recommitted to him for further hearing on the damages suffered by the plaintiff from the defendant's inexcusable delay of seven months; that the direct damage suffered by the plaintiff was the loss of the means of economical operation which the use of the towers would have furnished; that during the period of delay the plaintiff lost all return on the money previously paid by it in part payment for the towers, all use of its wharf and the adjoining dock and all use of its investment in the coal pocket and other structures erected by it for use in connection with the towers; that the expense of demurrage, which had to be paid to get coal loaded during that portion of the seven months while there was a strike or the effects of the strike lasted, might have been incurred reasonably by the plaintiff in discharging coal at another wharf, instead of discharging it at the plaintiff's wharf which had been rendered useless by the coal towers not being in working order through the inexcusable delay of the defendant; that the fact, that the delay was caused by a strike which came "like a flood or a tornado" in no way excused the defendant from paying the damages ensuing from his breach of contract; and that the fact that the price which the plaintiff had to

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pay for the equivalent of its wharf during the time of the strike was exceedingly high because of the strike did not deprive the plaintiff of the right to recover it as damages.

TWO ACTIONS OF CONTRACT for alleged breaches of the same agreement in writing printed below, brought against one another by the two corporations who were the parties to that contract. Writs in the Supreme Judicial Court dated respectively June 11 and July 8, 1904.

The C. W. Hunt Company declared in two counts, the first count to recover a balance of $5,450 and interest upon a contract by which the Boston Elevated Railway Company agreed to pay $25,000 for two 2-ton coal hoisting towers, of which it had paid $19,550, the second count to recover $58,141.91 and interest according to an account annexed, including the same items which went to make up the performance of the contract set up in the first count, and also numerous items for extras thereto, and items for articles supplied to the Boston Elevated Railway Company to replace articles broken or worn out by it in the use of the towers.

The Boston Elevated Railway Company declared in eight counts, the first count to recover demurrage alleged to have been paid because of delay by the C. W. Hunt Company in completing the contract, the second count for wharfage and dockage alleged to have been paid for the same reason, the third count to recover additional extra cost of discharging alleged to have been paid for the same reason, the fourth count to recover the same three things sought to be recovered by the first, second and third counts, the fifth count to recover money paid in settlement of personal injuries sustained by a workman while using the towers, the sixth count to recover back the $19,550 paid on account of the principal contract, the seventh count to recover incidental charges amounting to $38.65, and the eighth count to recover $443.74, paid on account of insurance.

During the spring and summer of the year 1892 the Boston Elevated Railway Company was erecting on Lincoln Wharf a large coal pocket for the storage of coal. The coal was to be brought to Lincoln Wharf in steamships or other vessels, hoisted out of the vessels to the top of the pocket by means of coal hoist-

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ing towers, discharged into the pocket through hatches in the roof, and thence distributed to various power stations of the railway company.

On May 31, 1902, while the pocket was building and was nearing completion, the parties entered into the contract sued upon, which was as follows:

"This Agreement, by and between the C. W. Hunt Company, hereinafter called the contractor, — and the Boston Elevated Railway Company, hereinafter called the railway company, — both being corporations duly established by law;

"Witnesseth: That the parties to this agreement, each in consideration of the covenants and agreements on the part of the other herein contained, hereby covenant and agree, each for itself and its successors and assigns as follows:

"Section 1. The contractor agrees to furnish all labor, materials, tools and appliances and to construct in complete working order on tracks on top of the coal pocket at Lincoln Wharf, Boston, Mass. two (2), timber, steam and electrically operated, two-ton coal hoisting towers with all necessary machinery and equipment for the proper operation of the same, as per specifications of the railway company, signed by Robert B. Davis, designing engineer, dated May 1st, 1902, attached hereto and drawings referred to therein, both of which are made a part of this agreement, and to furnish the spare parts called for by said specifications.

"Section 2. The contractor agrees to begin work at the earliest possible moment, to carry the same on under the direction and to the satisfaction of the railway company, its vice-president and his authorized agents, to prosecute the same with all diligence and despatch to the earliest possible completion, and hereby agrees that one tower shall be completed and in working order on or before August 15th, 1902, and that the entire work shall be completed on or before September 1st, 1902, unless delayed by fire, strikes or unavoidable accident.

"Section 3. The contractor agrees that all material furnished and work done hereunder shall be subject to acceptance by the railway company and its vice president; that all apparatus furnished and work done shall be subject at all times to the inspection of said vice president or his authorized

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agents, and that any work performed or material furnished which may be deemed by said vice president to be not in accordance with the terms of this contract and accompanying specifications shall be immediately replaced by the contractor at its own expense.

"Section 4. The contractor agrees to assume all responsibility for accident or damage to person or property, including any accident or damage to its agents or employes, or to its apparatus, materials or work, in any way growing out of said work or incident thereto, and hereby covenants and agrees to indemnify and save harmless said railway company from and against any and all claims, suits or demands whatsoever arising therefrom, from any liens whatsoever or from non-compliance with regulations made by legal authorities.

"Section 5. Said contractor guarantees to the railway company the right to own, use, repair, or replace all parts and devices attached by it in building, furnishing and erecting said construction, and hereby agrees to protect and save harmless the said railway company from and against all claims or suits under any patents whatsoever in regard to said construction or any part thereof.

"Section 6. In consideration of the foregoing agreement the railway company agrees to pay unto the contractor or its legal representative, the sum of twenty-five thousand (25,000) Dollars, payment to be made as follows:

"On the tenth day of each month a sum, which added to previous payments, shall amount to eighty-five (85) per cent of the value of the materials furnished and work performed on the first day of said month, — which shall be estimated by the representative of the railway company, — the balance of the contract price to be paid thirty (30) days after the machinery is in successful operation.

"Section 7. It is further understood and agreed that all provisions in the specifications hereto attached are to be deemed a part hereof with the same force and effect as if expressly rewritten and inserted herein.

"In Witness Whereof, the contractor has hereunto set its hand and seal, and the railway company has caused this agreement to be executed by its vice president, Charles S. Sergeant,

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and its corporate seal to be hereto affixed, on this thirty-first day of May, A. D. 1902.

"C. W. Hunt Company,
By C. W. Hunt, Prest.

"Form approved: G. C. T.

"Boston Elevated Railway Company,
By Charles S. Sergeant, Vice President."

Here followed specifications, some of which are mentioned in the opinion.

The cases were referred to R. D. Weston-Smith, Esquire, as auditor, with an agreement of the parties that his findings of fact were to be final. The facts found by the auditor are stated and described in the opinion.

He found that the C. W. Hunt Company was entitled to recover in the first action, under the first count of its declaration, $5,450, with interest from February 16, 1904, and under the second count of its declaration, $4,495.87, with interest on each item composing this last total from its date. He found that the railway company was entitled to recover in the second action, under the seventh count of its declaration, $34.14, together with interest on each item composing this total from the date set against it in the account which forms a part of the seventh count of the railway company's declaration, and under the eighth count of its declaration, $250, together with interest on $150 of this amount from September 9, 1902, and on $100 from October 31, 1902. He found that the railway company was not entitled to any of the damages claimed on account of delay or to the sum paid in settlement of personal injuries resulting from a certain accident.

The cases came on to be heard before *Rugg*, J., on motions of the Boston Elevated Railway Company to recommit them to the auditor and on its requests for rulings, and on motions of the C. W. Hunt Company to enter judgment on the auditor's report. With the agreement of the parties, the justice reserved the cases for determination by the full court, such disposition to be made of them as justice might require.

E. F. McClennen, for the C. W. Hunt Company.

A. P. Stone, for the Boston Elevated Railway Company.

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LORING, J. 1. We are of opinion that the auditor was right in proceeding on the footing that the Hunt Company was entitled to recover if "the towers did conform to the contract and specifications, as modified by the parties in March, 1903, and that if they were not satisfactory to the vice-president of the railway company they ought to have satisfied a reasonable man."

This is not a contract "into which considerations of taste or personal preference may enter," as was said by Knowlton, C. J., in *Noyes* v. *Eastern Accident Association*, 190 Mass. 171, 172. That is to say, it is not a case within *McCarren* v. *McNulty*, 7 Gray, 139; *Brown* v. *Foster*, 113 Mass. 136; *White* v. *Randall*, 153 Mass. 394; *Webber* v. *Cambridgeport Savings Bank*, 186 Mass. 314, 315. The case at bar is for work of a business character and comes within *Hawkins* v. *Graham*, 149 Mass. 284, if as matter of construction it was to be done to the satisfaction of the defendant and not to that of a third person as arbitrator.

The provision of the contract is: "The contractor agrees that all material furnished and work done hereunder shall be subject to acceptance by the railway company and its vice president; that all apparatus furnished and work done shall be subject at all times to the inspection of said vice president or his authorized agents, and that any work performed or material furnished which may be deemed by said vice president to be not in accordance with the terms of this contract and accompanying specifications shall be immediately replaced by the contractor at its own expense." There are also these provisions in the specifications: "The work shall be executed under the direction and supervision of the vice-president of the Boston Elevated Railway Company or his authorized representative. . . . The vice-president of the Boston Elevated Railway Company, without relieving the contractor from any responsibility therein, reserves the right to direct the manner and order in which the work shall be executed."

Had Mr. Sergeant been a third person and not an officer of the defendant corporation, the provisions of the specifications would have been enough to make him a *quasi* arbitrator within the rule applied in *Atkins* v. *Barnstable*, 97 Mass. 428; *Palmer* v. *Clark*, 106 Mass. 373; *Flint* v. *Gibson*, 106 Mass. 391;

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Robbins v. *Clark*, 129 Mass. 145; *National Contracting Co.* v. *Commonwealth*, 183 Mass. 89; *Norcross* v. *Wyman*, 187 Mass. 25.

But Mr. Sergeant represented the railway company in this transaction, and was not a third person. That being so, the provision that the work was to be done "subject to acceptance by the railway company and its vice president" would have brought this case within *Hawkins* v. *Graham* without a doubt had that been the only provision of the contract on this point. In such a case Mr. Sergeant in accepting or not accepting the work would have acted for and represented the railway company, and would not have been a third person acting as arbitrator.

Although, as we have said, the provisions in the specifications look the other way, we are of opinion on the whole that Mr. Sergeant must be taken to have been the representative of the defendant and not a third person in this matter. This conclusion is enforced by the fact that all the correspondence set forth in the report which took place under the contract was carried on by Mr. Sergeant in behalf of the railway company.

2. The railway company urges that the auditor is wrong in his conclusion from the correspondence set out in the report "that if the changes specified were made, and if they accomplished the results which they might fairly be expected to accomplish, the railway company would be satisfied with the towers and would accept them."

This contention of the railway company is based on these words in the closing letter of April 8: "We have no desire whatever to interrupt the work, but we waive none of our rights under the contract to reject any or all of it if it proves unsatisfactory when completed." This statement is to be taken in connection with what went before.

On February 19, 1903, (that is to say, six months after the first tower and five and a half months after the second tower should have been completed and in working order,) Mr. Sergeant wrote to the Hunt Company a letter stating that "up to this time there is no indication that these towers are likely to prove in any degree adequate or satisfactory," complaining that the Hunt Company's men had left the work, and ending with this threat: "Unless you proceed without further delay to com-

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plete your contract we shall be compelled to install an efficient apparatus at your expense." In answer the president of the Hunt Company wrote a letter of explanation ending with this request: "If you will kindly point out any feature of the contract which has not been carried out by us, I would be pleased to have you advise me of the same, and it will be given immediate and careful attention, and meanwhile we say, courteously but emphatically, that we deny your right 'to install an efficient apparatus at your (our) expense' or any apparatus at our expense, and in the same way we repudiate the suggestion contained in your letter, that the machinery is not in accordance with our contract, or in any wise inefficient through any fault of ours." Thereupon a personal interview took place on March 3, 4 and 5, in which Mr. Sergeant undertook to tell the representative of the Hunt Company "in what respects the towers failed to meet the requirements of the railway company." These were embodied in a letter from Mr. Hunt, dated March 17, under six heads, and stated that "Each of the other points noted in the conference we are now in the process of making such changes in, as we have no doubt will meet your approval." Another conference took place on March 19 and 20, and the points discussed were embodied in a letter of Mr. Hunt dated March 23, under fourteen heads. In this letter Mr. Hunt states what he proposes to do in respect to each of the fourteen matters. On the 24th Mr. Sergeant discusses each of the fourteen heads and what the Hunt Company proposes as to each, and on the 27th Mr. Hunt answers, dealing with the fourteen items in a similar way. Then follows a correspondence not set out in the report but which is characterized by the auditor as "some rather lively correspondence . . . as to who was now causing delay"; and on April 8 this is closed by a letter from Mr. Sergeant in which he states that he is "pleased to note that you now wish to immediately proceed with the completion of the towers in accordance with my letter of the 24th ult. We supposed you would do so immediately on receipt of that letter, nor was there anything in your subsequent letter of the 27th ult. which appeared to be in conflict with the work proposed to be done. We were therefore at a loss to understand your telegram of 1st inst. So far from holding up the work, we have de-

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manded and do demand that you proceed forthwith to complete your contract." Then follows the paragraph here relied on by the railway company, which we repeat in full: "You mention a desire that we should, in acknowledging your letter, state that the work can proceed to completion without interruption. We have no desire whatever to interrupt the work, but we waive none of our rights under the contract to reject any or all of it if it proves unsatisfactory when completed." We agree with the auditor that this closing paragraph reserves the railway company's right to accept or reject the work done under the contract as modified by these interviews and this correspondence, and that defects not then pointed out and insisted upon were waived.

3. We find no error with the way in which the auditor dealt with the provision of the contract that "the towers may be operated by two men or one man as may be preferred," and the contention of the railway company "that the boom does not swing in a horizontal plane sufficiently to make its swinging of any practical value." The first of these two matters is disposed of by the auditor in these words: "If this was a difficulty, I find that it was one which was apparent in March, 1903." And the second was as follows: "If this was a defect, I find that it too was apparent in March, 1903. And I find that so far as these two objections to the towers are concerned, they were waived by the railway company by virtue of the conferences and correspondence above referred to — not expressly, but by necessary implication."

4. During the hearings before the auditor a crack appeared in the upper part of the left hand frame of each engine. The counsel for the railway company assumed in his argument that these cracks appeared there for the first time, not that they existed before but were discovered then, as the auditor in one part of his report seems to imply. We shall treat the fact on the footing assumed by the railway company's counsel. The auditor found that these cracks came not from a faulty design, but from some fault in the casting, and that they "constitute a serious defect." The railway company contends "that this justified the rejection of the towers and [that] the contract has never been fulfilled." Under this finding the frames of the en-

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gines did not meet the requirements of clause 1 of Section 6 * of the specifications, nor the requirements of Section 3 † of the contract, as that section has been construed by us. If this defect gave the railway company a right to reject the engines altogether (which we do not intimate) that right has been waived by the continued use of them by the railway company. It is to be noted that these engines are not in any way affixed to the land.

On the other hand we are of opinion that the auditor was wrong in the way he dealt with the railway company's claim for damages by reason of these cracks. He disposed of the matter in these words: "These two parts of the apparatus proved defective within two years after the date of completion, and by the terms of section 6 of the specifications the Hunt Company is bound to furnish new side-frames free from flaws and of suitable strength. On my findings, therefore, these cracks pass out of the case as an element of damage."

Had the first clause of Section 6 of the specifications which we have just set forth stood alone, the damages for a breach of it caused by a defect in the casting, would have included not only furnishing new frames but also the expense of taking off the old frames and putting on new ones, together with the loss caused by the towers being out of commission while these repairs were being made. And the same damages would have been due under Section 3 of the contract. The auditor's ruling is in effect a ruling that these two provisions (to wit, clause 1

* "Section 6. The contractor guarantees that the apparatus furnished by him shall be ample and suitable in design and construction to perform the work as hereinafter specified, and that it shall be free from all defects in workmanship or material.

"He also agrees to furnish free of charge to the railway company any part proving defective in the apparatus or any part thereof within two years after date of complete installation in working order of said apparatus."

† "Section 3. The contractor agrees that all material furnished and work done hereunder shall be subject to acceptance by the railway company and its vice president; that all apparatus furnished and work done shall be subject at all times to the inspection of said vice president or his authorized agents, and that any work performed or material furnished which may be deemed by said vice president to be not in accordance with the terms of this contract and accompanying specifications shall be immediately replaced by the contractor at its own expense."

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of Section 6 of the specifications, and Section 8 of the contract) are limited and controlled by the second clause of Section 6 of the specifications. In that we do not think that he was right. The second clause of Section 6 is not introduced by the words: "provided, however," or by similar words. It begins with the words "He also agrees." That is to say, it is an agreement in addition to that contained in clause 1 of Section 6, not one qualifying it.

The result of the two clauses is that in case of a defect in the material of any part of the apparatus (discovered within two years) the railway company had a right to elect to claim damages or to call for a new part.

The case must be recommitted to the auditor for further hearing on the amount of these damages.

5. We find no error in the finding of the auditor as to the allowance of extras * allowed by him, except in the matter of interest. The auditor has allowed interest on each item from the date when it was finished. The Hunt Company now attempts to support that ruling on the authority of *Foote* v. *Blanchard*, 6 Allen, 221, and similar cases in which it is held that interest runs on a sale for cash from delivery of the goods sold. But of the forty-five items here in question (amounting to $3,042.61), two (amounting to $718.60) are for work done, three (amount-

* "The extras for which I rule that the Hunt Company is entitled to recover are such as were supplied to take the place of parts of the machinery broken through the negligence or inexperience of the railway company's employees, or to take the place of parts of the apparatus which were worn out in the operation of the towers by the railway company. Many of these things were furnished before the towers were completed or ready to turn over, but they cannot be regarded as alterations or additions of materials or labor within the meaning of specifications, sec. 36, which the vice-president might order, and which, if ordered, were to be ordered by him in writing. They were outside the contract altogether. The railway company undertook to operate the towers before they were completed, for its own advantage as well as for the advantage of the Hunt Company, and extras of the kind I describe should be paid for just as much as if the towers had been turned over completed at the time when the railway company's engineers began to operate them. Parts of the apparatus ordered by the railway company after the towers were completed, to supply the places of broken or worn out parts, or apparatus ordered by it which was outside of the contract, must, of course, be allowed for."

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ing to $168.33) are for part of a bill of a person named, the nature of which is not shown, and sixteen (amounting to $58.49) are for freight. It is manifest that the items do not come within the rule of *Foote* v. *Blanchard*. Interest is due here from the date of the writ only.

6. Lastly, we are of opinion that there was a mistrial in the matter of damages suffered by the railway company from delay in the completion of the towers.

By the terms of the contract the two towers should have been "completed and in working order" one on or before August 15, 1902, and the other on or before September 1, 1902. By the finding of the auditor they were completed on May 25, 1903, and July 21, 1903, respectively. That is to say, there was a delay of nine months and ten days in case of the first, and a delay of ten months and twenty-one days in case of the second tower. Of these two periods of delay the auditor found that seven months in each case was the "inexcusable delay" of the Hunt Company.

For this delay the auditor finds that the railway company is not entitled to recoupment in the action brought against it for the contract price, nor to any recovery in the cross action.

It appeared on the evidence that during some portion of the whole period of delay, namely, from August 15, 1902, to July 21, 1903, there was a coal famine in Boston owing to a strike at the coal mines. What portion of that period was covered by the coal famine and strike is not found by the auditor.

The railway company introduced evidence that under ordinary circumstances the value of each tower was $25 a day, or at least six cents a ton, and that during the period of delay it paid out money in demurrage, dockage and similar expenses.

The claim for damages under ordinary circumstances, that is to say, before the effect of the strike was felt in Boston and after it ceased, is dealt with by the auditor in these terms: "So far as the damages which might be allowed [in recoupment] in the first case are concerned, it was contended that the fair rental value of the property to the defendant might be allowed, and the only evidence as to what this might be was the evidence of one expert produced by the railway company who said that the value of such towers was $25 a day for each tower. This would

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amount to about $15,000 a year, and it is obviously absurd. No evidence was introduced which enables me to find what their fair rental value by the month or by the year really was, and I am of the opinion that the fair rental value is not a proper measure of damages anyway, for the towers were not intended to be rented and are not commonly rented in this port. . . . The period of delay overlaps to some extent the time when the strike was over and normal conditions were restored. As to this period the true measure of damages might have been the difference in the cost to the railway company of delivering the coal at the central and other stations accessible to domestic vessels and then distributing it so far as might be necessary from those points, and the cost of discharging it at Lincoln Wharf and distributing it from there. But no evidence was introduced before me as to what the comparative cost of these two methods of discharge and distribution was."

The claim for damages during the period affected by the strike is dealt with as follows: "So far as all the damages are concerned which the railway company undertook to prove under the first four counts of its declaration in the second case, I find that they were all attributable to the coal strike, which came without warning, like a flood or tornado. . . . A number of vessels were in the harbor simultaneously so that even those which were small enough to go into the Lincoln Wharf dock could not all have been discharged there. It is, of course, true that if the towers had been running then as they are running to-day considerable quantities of coal could have been discharged into the Lincoln Wharf pocket and distributed from that point, and this method of discharging the vessels would have saved the railway company a considerable amount of money. But the damages which it suffered I find and rule were attributable to the coal strike, and not to the failure of the Hunt Company to perform its contract, and I rule that the railway company is not entitled to recover any damages in the second case."

The conclusion reached by the auditor on both claims was as we have before said that "the railway company is not entitled to recover any damages whatever."

We are of opinion that the auditor was wrong in the way he dealt with both periods.

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Dealing first with the period when normal conditions prevailed:

Upon this branch of the case the main ground on which the auditor went (as we understand his report) is that no damages were due because coal towers "are not commonly rented in this port."

A man who has been deprived of his property is not precluded from recovering therefor because the property in question is not "commonly rented." That point is covered by *Weston* v. *Boston & Maine Railroad*, 190 Mass. 298.

The case of *Weston* v. *Boston & Maine Railroad* is different from the case at bar in this: In *Weston* v. *Boston & Maine Railroad* the goods to be transported were so essential to the business of the plaintiff that without them the business came to an end and the loss was measured by the profits ordinarily made. The two towers on Lincoln Wharf were not so essential to the business of the railway company that its business was stopped by the Hunt Company's failure to furnish them as they had contracted to do. The direct damage suffered by the railway company in the case at bar was the loss of economical operation which would have been furnished by the use of these towers. See in this connection, for example, *Abbott* v. *Hapgood*, 150 Mass. 248.

Direct evidence on that point was introduced by the railway company. One part of this evidence is dealt with by the auditor in these words: "The only evidence as to what this might be was the evidence of one expert produced by the railway company who said that the value of such towers was $25 a day for each tower. This would amount to about $15,000 a year, and it is obviously absurd."

The auditor was not bound to accept the testimony of the expert because it was the "only evidence." See *Lindenbaum* v. *New York, New Haven, & Hartford Railroad*, 197 Mass. 314, and cases there cited.

On the other hand if the auditor knew enough about the subject in question to reject the evidence of this expert as putting the value too high, it is hard to see why he did not cut it down to the proper amount. And it is certainly a *non sequitur* to come to the conclusion that no damages were due.

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The auditor in this connection went on and stated the difficulty of arriving at a satisfactory result on this matter owing to the fact that the towers had been operated by the railway company to some extent before they were completed, that the railway company's engineers were inexperienced, and that extraordinary difficulty was encountered in handling English coal which the railway company had bought. He ends this part of his report with the statement that "any finding on that point [would be] the wildest sort of guess." In this connection what was said by Lord Halsbury in *The Mediana*, [1900] A. C. 113, 116, is very pertinent: "Of course the whole region of inquiry into damages is one of extreme difficulty. You very often cannot even lay down any principle upon which you can give damages; nevertheless it is remitted to the jury, or those who stand in place of the jury, to consider what compensation in money shall be given for what is a wrongful act. Take the most familiar and ordinary case: how is anybody to measure pain and suffering in moneys counted? Nobody can suggest that you can by arithmetical calculation establish what is the exact amount of money which would represent such a thing as the pain and suffering which a person has undergone by reason of an accident."

But even if the auditor was right in his conclusion that on the evidence before him the value of the use of these two towers when ordinary conditions prevailed could not be measured in money, he was wrong in his conclusion that no damages were due here.

It was held in *The Greta Holme*, [1897] A. C. 596, and in *The Mediana*, [1900] A. C. 113, that when a person is deprived of property he is entitled to substantial damages, even although the property in question did not yield an income to the owner.

In *The Greta Holme* a dredger owned by the Mersey Docks and Harbour Board was injured by collision with the Greta Holme, for which the latter was alone to blame, and was laid off for fifteen weeks for repairs. The Mersey Docks and Harbour Board was a public body charged with the duty (*inter alia*) of keeping the harbor of Liverpool from filling up with silt. Its funds are derived from rates levied upon those using the undertaking. It was held that this board was entitled to substantial damages for loss of the use of the dredger during these

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fifteen weeks. This decision was followed by that in *The Mediana*, [1900] A. C. 113, where the lightship Comet, owned by the same Mersey Docks and Harbour Board, was run into by the Mediana and thereby laid off for seventy-four days. During these seventy-four days a spare lightship, kept by the board for the purpose, took the Comet's place, and it was again contended that the owners of the Comet could not recover damages for being deprived of the Comet for these seventy-four days. In delivering judgment in the latter case Earl Halsbury, L. C., said: "What right has a wrongdoer to consider what use you are going to make of your vessel? More than one case has been put to illustrate this: for example, the owner of a horse or of a chair. Supposing a person took away a chair out of my room and kept it for twelve months, could anybody say you had a right to diminish the damages by showing that I did not usually sit in that chair, or that there were plenty of other chairs in the room? The proposition so nakedly stated appears to me absurd."

Both these cases are cases of tort, and would not necessarily determine the question before us if the only claim to damages which the railway company have here was for loss in economical operation from not having a machine when by the terms of a contract it was entitled to it. For the moment we are assuming that no such loss was proved in the case at bar. But it is apparent that that was not the only loss which the railway company suffered here. So long as these towers were in process of construction after the time for their completion had expired, it would seem that the railway company must have lost (1) all return on the money previously paid by it in part payment for the towers, (2) all use of Lincoln Wharf as a wharf, (3) all use of Lincoln Wharf dock as a dock, and (4) all use of its investment in the coal pocket and other structures erected by the railway company in connection with the towers. So long as the Hunt Company was at work on the towers after the time for completion of them had passed, the railway company was thereby deprived of all return from its investment in these four items of property, and to that extent the decisions in the Greta Holme and the Mediana are applicable.

There is one other matter that should be noticed in this con-

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nection, namely, the loss incurred by the railway company in the economical handling of the coal to be used at the Lincoln Wharf power station. The Lincoln Wharf power station uses four thousand tons a month, and has a storage capacity in the station (in addition to that of the coal pocket on the wharf) of three thousand tons. It is unbelievable that it is as economical to unload coal at a hired wharf, or at another wharf of the railway company, carry it to Lincoln Wharf, and then elevate it into the storage room of that plant as it would be to discharge it directly into that storage room from the hold of the coal vessel by means of these towers.

At the new trial there may be more evidence bearing directly on the value of the use of the towers, and on all these matters, and it would serve no useful purpose to discuss them further now.

It is proper to add that we have found nothing in the thirty cases cited *en masse* on this part of the case by the Hunt Company,* in conflict with the conclusion to which we have come.

This brings us to the period when the conditions in Boston Harbor were affected by the coal strike and demurrage and dockage had to be and were paid by the railway company.

In the first place, if the auditor had been right in ruling that there could be no circumstances under which the railway com-

* The cases in the brief of the C. W. Hunt Company referred to above were as follows: *Denney* v. *New York Central Railroad*, 13 Gray, 481. *Hoadley* v. *Northern Transportation Co.* 115 Mass. 304. *Fox* v. *Boston & Maine Railroad*, 148 Mass. 220. *Swift River Co.* v. *Fitchburg Railroad*, 169 Mass. 326. *Waite* v. *Gilbert*, 10 Cush. 177. *Wagner* v. *Corkhill*, 40 Barb. 175. *Allis* v. *McLean*, 48 Mich. 428. *Central Trust Co.* v. *Arctic Ice Co.* 77 Md. 202. *The Henry Buck Co.* 39 Fed. Rep. 211. *De Ford* v. *Maryland Steel Co.* 113 Fed. Rep. 72. *Bridges* v. *Stickney*, 38 Maine, 361. *Fox* v. *Harding*, 7 Cush. 516. *Hadley* v. *Baxendale*, 9 Exch. 341. *British Columbia Saw Mill Co.* v. *Nettleship*, L. R. 3 C. P. 499. *Merrimack* v. *Quintard*, 107 Mass. 127. *Harvey* v. *Connecticut Co.* 124 Mass. 421. *Clark* v. *Moore*, 3 Mich. 55. *Willey* v. *Fredericks*, 10 Gray, 357. *Taylor* v. *McGuire*, 12 Mo. 313. *Mather* v. *American Express Co.* 138 Mass. 55. *Johnston* v. *Faxon*, 172 Mass. 466. *Edgar* v. *Breck & Sons*, 172 Mass. 581. *Manning* v. *Fitch*, 138 Mass. 273. *Florence Machine Co.* v. *Daggett*, 135 Mass. 582. *Spiers* v. *Union Drop Forge Co.* 180 Mass. 87. *Abbott* v. *Hapgood*, 150 Mass. 248. *Lonergan* v. *Waldo*, 179 Mass. 135. *Watson* v. *Needham*, 161 Mass. 404. *White* v. *Moseley*, 8 Pick. 356. *Whitehead & Atherton Machine Co.* v. *Ryder*, 139 Mass. 366.

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pany could recover sums paid for demurrage and dockage during the time of the strike, it would not have followed that nothing in the way of damages could be recovered by it during this period. If it could not recover the extraordinary damages which it in fact suffered, it could recover ordinary damages not exceeding in amount the extraordinary damages suffered by it in fact. *Cory* v. *Thames Iron Works Co.* L. R. 3 Q. B. 181.

But we are of opinion that the auditor was wrong in ruling that under no circumstances could sums paid for demurrage and dockage be recovered.

During the time the strike lasted, including the time when conditions in Boston Harbor were affected by it (or at any rate during a part of this time) the Hunt Company was in default in not furnishing the railroad company with the two towers called for by the contract for unloading coal at the railway company's wharf known as Lincoln Wharf.

Under these circumstances the railway company had a right to procure in any reasonable and proper way, at the expense of the Hunt Company, what the Hunt Company had agreed to furnish and had not furnished to it, and all sums so expended could be recovered as the damage suffered by it.

No rule of damages is better settled. It was applied in *Johnson* v. *Arnold*, 2 Cush. 46; *Waite* v. *Gilbert*, 10 Cush. 177; *Brown* v. *Smith*, 12 Cush. 366; *Mather* v. *American Express Co.* 138 Mass. 55; *Whitehead & Atherton Machine Co.* v. *Ryder*, 139 Mass. 366; *Peak* v. *Frost*, 162 Mass. 298; *Swift River Co.* v. *Fitchburg Railroad*, 169 Mass. 326; *Weston* v. *Boston & Maine Railroad*, 190 Mass. 298, 299, 300; *Metropolitan Coal Co.* v. *Boutell Transportation & Towing Co.* 196 Mass. 72. And in other jurisdictions see *Hamlin* v. *Great Northern Railway*, 1 H. & N. 408; Blackburn, J., in *Hinde* v. *Liddell*, L. R. 10 Q. B. 265, 268; *Featherston* v. *Wilkinson*, L. R. 8 Ex. 122.

It goes without saying that the two towers here in question, in connection with the Lincoln Wharf power plant and coal pocket of the railway company on that wharf had no duplicate, and for that reason the exact facilities called for by the contract could not have been obtained by the railway company. For example, two towers could not be obtained which would discharge coal directly into the Lincoln Wharf power plant for use in that

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station. That station (as we have said) used four thousand tons a month and had a storage capacity of three thousand tons apart from the storage capacity of the coal pocket on the wharf.

But when the exact thing called for by the contract cannot be obtained by the party to whom performance is due, that party can procure at the expense of the one in default what under all the circumstances reasonably amounts to the next best thing. For example, if a railroad fails to carry a passenger to his destination he can under ordinary circumstances take a carriage at the railroad's expense. *Hamlin* v. *Great Northern Railway*, 1 H. & N. 408. *Hinde* v. *Liddell*, L. R. 10 Q. B. 268. This was conceded by the parties in *Sears* v. *Eastern Railroad*, 14 Allen, 433. In the recent case of *Metropolitan Coal Co.* v. *Boutell Transportation & Towing Co.* 196 Mass. 72, the defendant had contracted to provide the plaintiff with a tug and barges for the transportation of coal, and it failed to do so. The plaintiff not being able to hire another tug with the accompanying barges, brought its coal in sailing vessels. The difference between the cost of bringing the coal in sailing vessels and the price to be paid for the tug and barges was held to be a proper measure of damages.

It being impossible to procure exactly what the contract here in question called for, the railway company had the right to get (at the Hunt Company's expense) as nearly as it could what it would have had if the towers had been in working order. It could have hired another wharf, unloaded its coal vessels there, carried to Lincoln Wharf the coal to be used at that power station, and distributed from this hired wharf what would have been unloaded at the Lincoln Wharf coal pocket for distribution. Having done so, it could have recovered from the Hunt Company (1) the difference between the expense of unloading the coal for the Lincoln Wharf plant directly into that building and unloading it at the hired wharf, carting it from there to Lincoln Wharf and putting it in the storage room of that station; and (2) the difference in expense, if any, between unloading at the hired wharf and distributing it from that point, the coal to be distributed among other stations, and the expense of doing the same work at Lincoln Wharf using the two towers in question, plus the loss from the Lincoln Wharf plant lying idle. And if

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wharves were not to be had (as would seem to have been the case at this time), and the railway company could discharge a vessel at one of its other wharves without interfering with other vessels which were to be discharged there, it would be proper for it to do so.

Further, if demurrage had to be paid for vessels which could have been discharged at Lincoln Wharf while they were waiting to discharge at wharves hired by the defendant or at other wharves owned by the railway company, that might well be an expense reasonably incurred in procuring as nearly as possible what it (the railway company) would have had, if the contract had been fulfilled.

The railway company could not procure a vessel of coal by ringing a bell or turning on a faucet. During and after a coal strike, coal has to be bought when and where it can be obtained, ships have to be secured when they can be chartered, and finally, the rule of a port is first come first served, and the result is that ships have to take their turn and wait for an opportunity to discharge. Under such circumstances the payment of demurrage may well be an expense reasonably incurred in discharging at another wharf in place of discharging at the wharf which was rendered useless by the coal towers not being in working order through the "inexcusable delay" of the contractor.

What we have said is not to be taken as exhausting the matter under consideration, but as showing some of the circumstances under which demurrage, dockage and similar expenses might be allowed as money expended in securing what the railway company was entitled to have during the seven months here in question of "inexcusable delay" on the part of the Hunt Company.

We assume that the ruling of the auditor here in question was made on the authority of such cases as *Denny* v. *New York Central Railroad*, 13 Gray, 481, *Hoadley* v. *Northern Transportation Co.* 115 Mass. 304, and perhaps *The Henry Buck*, 39 Fed. Rep. 211, cited by the defendant; but in those cases there was no question of expending money to secure what was due under the contract. The fact that demurrage had to be paid to get coal landed during that portion of the seven months during which there was a strike or while the effects of the strike lasted, in the case at bar, was because there were vessels waiting to be dis-

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charged which arrived before the vessels which brought the railway company's coal. The fact that this was caused by a strike which, in the language of the auditor, came "like a flood or a tornado" was of no consequence. The price which had to be paid for the equivalent of Lincoln Wharf during the seven months in which there was a strike, was exceedingly high, and the reason why it was exceedingly high was doubtless because of the coal strike. But the cause of the high price was of no consequence. Where one party to a contract can buy or sell at the expense of the other, that other has to stand the change in price, no matter what the cause of it is. If, for example, a plaintiff in buying wheat or corn at the defendant's expense, to secure what the defendant contracted the plaintiff should have, should pay a higher than the ordinary price, it is of no consequence that the reason why the price of wheat or corn had gone up was because of a flood or of a tornado which destroyed a large part of the crop.

The result is that the case must be recommitted to the auditor (1) to correct the allowance of interest before the date of the writ on the sums due for extras, (2) for further hearing on the damages suffered by the railway company from the cracks in the frames of the engines, and (3) for further hearing on the damages suffered by the railway company from the Hunt Company's inexcusable delay of seven months.

So ordered.

EDWIN K. BEARSE *vs.* JOHN L. McLEAN.

Suffolk. November 22, 1907. — June 15, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Practice, Civil, Findings of trial judge. *Statute*, Extraterritoriality. *Conflict of Laws*. *Contract*, Validity. *Wagering Contracts*.

The findings of fact made by a trial judge sitting without a jury are not open to revision if there is evidence on which they could have been made.

R. L. c. 74, § 7, making void a contract for the sale of securities unless the person contracting to sell them is the owner or assignee or is authorized to sell by the owner or assignee or his agent, applies only to contracts made in this Commonwealth.

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R. L. c. 99, § 4, giving the right to recover money paid on margins under the wagering contracts described in that section, does not apply to contracts made outside this Commonwealth.

RUGG, J. This is an action of contract brought under R. L. c. 99, § 4, to recover the payments made and the value of securities delivered to the defendant, a stockbroker, as margins for the purchases and sales of stocks. A judge of the Superior Court, sitting without a jury, made a finding that "there were actual purchases and sales or valid contracts for such purchases and sales, made by the defendant for the account of the plaintiff in accordance with the terms of employment of the defendant by the plaintiff." * The findings of fact made by a trial judge are not open to revision in the appellate tribunal. They can be set aside only when they have no foundation in evidence. It is not for us to say what inferences appear the more reasonable. We incline to the view that there was evidence which, taken at its full weight, supports the conclusions that the relation between the plaintiff and the defendant was that of principal and agent, so that this action comes under the second branch of the statute, and that the plaintiff employed the defendant as his agent to go to New York and there make the several purchases of stock, on account of which the payments now sought to be recovered were made. These being found as facts, the question of the validity of the contracts for purchase or sale depends upon the law prevailing where such contracts are made. R. L. c. 74, § 7, governs only contracts made in this Commonwealth. R. L. c. 99, § 4, does not provide that the validity of the contracts there described shall depend upon the law of this jurisdiction, unless they are made here, but leaves their legality to stand or fall upon the law of the place where the contract is made. No evidence was introduced as to the law of New York. Hence it must be assumed to be the same as the common law of this Commonwealth. The method of purchase, sale and delivery of stocks disclosed upon this record as obtaining in the Consolidated Exchange, assuming that the transactions were genuine, may have been found to be valid at common law

* The case was heard by *Hitchcock*, J., upon an auditor's report. The judge found for the defendant; and the plaintiff alleged exceptions.

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and therefore valid in New York. It follows that it cannot be said that there was error of law in denying the several requests for rulings presented by the plaintiff.

Exceptions overruled.

F. E. Barnard, for the plaintiff.

I. McD. Garfield, for the defendant.

MATTIE T. HOOK *vs.* ELLEN A. BOLTON.

Suffolk. December 12, 1907. — June 15, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & RUGG, JJ.

Fixtures. Mortgage, Of real estate.

As between the mortgagor and the mortgagee of a dwelling house, gas fixtures attached to the building and used with it may or may not be personal property according to the facts and circumstances which tend to show that they do or do not belong to the building and were or were not intended to remain with the building as a part of it. And this also is true of steam radiators, a kitchen range and window screens and door screens.

A gas stove and window shades, running on rollers, in an ordinary dwelling house for a single family, not peculiarly fitted for use in this house but of a standard pattern, loosely affixed and easily removed, put into the house by its owner and mortgagor, as matter of law are personal property, and do not pass as part of the realty on a foreclosure sale under the mortgage.

TORT for the conversion of certain articles alleged by the plaintiff to be chattels but claimed by the defendant as fixtures annexed to a dwelling house numbered 86 on Bloomfield Street in Boston which she had purchased at a foreclosure sale. Writ in the Municipal Court of the City of Boston dated June 27, 1904.

On appeal to the Superior Court the case was tried before *White*, J. At the close of the evidence the plaintiff asked the judge to give to the jury the following instructions:

"1. I rule that the gas-fixtures and gas chandeliers in the house were personal property as matter of law, and did not pass by the mortgage, and that the plaintiff is entitled to recover damages for their value on June 18, 1904.

"2. Ordinary steam radiators, detachable from the pipes, and

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suitable for use in any building, are personal property as matter of law. If you find that the radiators in question were radiators of this sort, I rule that they did not pass by the mortgage and the defendant got no title to them, and that the plaintiff is entitled to recover as damages their value on June 13, 1904.

"3. Gas stoves of the kind described in the testimony in this case are personal property as matter of law; they did not pass by the mortgage; the defendant got no title to these stoves, and the plaintiff is entitled to recover as damages their value on June 13, 1904.

"4. Ordinary portable kitchen stoves or ranges, used principally for cooking, with hot water fronts, and with stovepipes running into the chimneys, are personal property as matter of law; and stoves or ranges of this character did not pass to the mortgagee or the defendant under the mortgage, but the plaintiff is entitled to recover as damages for their conversion their value on June 13, 1904.

"5. Ordinary window-shades, running on rollers, and detachable from their sockets, are personal property as matter of law; and window-shades of this character do not pass to the mortgagee or the defendant under the mortgage, but the plaintiff is entitled to recover as damages for their conversion their value on June 13, 1904.

"6. Window-screens and screen doors of the ordinary kind, made for temporary use during the summer months to keep out flies and other insects, bought ready made without being specially manufactured to fit this house, and suitable for use on any other house of a generally similar character, are personal property as matter of law; and window-screens and screen doors of this character did not pass to the mortgagee or the defendant under the mortgage, but the plaintiff is entitled to recover as damages for their conversion their value on June 13, 1904."

The judge refused to give the instructions requested, and left it to the jury to determine whether the articles referred to in the requests for instructions had become a part of the real estate by being annexed thereto, or remained personal property.

The jury returned a verdict for the plaintiff in the sum of $23.40, including interest since June 13, 1904; and the plaintiff alleged exceptions.

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The case was argued at the bar in December, 1907, before *Knowlton*, C. J., *Hammond*, *Loring*, *Braley*, & *Rugg*, JJ., and afterwards was submitted on briefs to all the justices.

O. O. Partridge, for the plaintiff.

J. F. Lynch, for the defendant.

KNOWLTON, C. J. This is an action of tort to recover the value of certain articles annexed to a dwelling house and used with it. The defendant claimed title under the foreclosure of a mortgage of the real estate. The plaintiff requested the presiding judge to rule as to several classes of these articles that they were personal property and not fixtures.

The principles of law applicable to cases of this kind have been stated many times in recent opinions of this court. In *Hopewell Mills* v. *Taunton Savings Bank*, 150 Mass. 519, 521, 522, is this language: "A machine placed in a building is found to be real estate or personal property from the external indications which show whether or not it belongs to the building as an article designed to become a part of it and to be used with it to promote the object for which it was erected or to which it has been adapted and devoted, an article intended not to be taken out or used elsewhere, unless by reason of some unexpected change in the use of the building itself. The tendency of the modern cases is to make this a question of what was the intention with which the machine was put in place." See also *Wentworth* v. *Woods Machine Co.* 163 Mass. 28; *Ridgeway Stove Co.* v. *Way*, 141 Mass. 557; *Southbridge Savings Bank* v. *Mason*, 147 Mass. 500; *Southbridge Savings Bank* v. *Stevens Tool Co.* 130 Mass. 547; *Pierce* v. *George*, 108 Mass. 78; *Leigh* v. *Taylor*, [1902] A. C. 157, 161. Of course the rule is the same as to articles attached to a dwelling house as it is as to machines put into a factory. As bearing upon the question, "the nature of the article and the object, the effect, and the mode of annexation are all to be considered." Generally, the question whether an article attached to a building belongs to the real estate is a mixed question of law and fact.

The application of these principles to the facts of the present case require us to sustain the rulings of the judge as to all the articles except the gas stoves and the curtains.

It is contended that the gas fixtures should have been held to

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be personal property as matter of law, on the authority of *Guthrie* v. *Jones*, 108 Mass. 191, and *Towne* v. *Fiske*, 127 Mass. 125. In the opinion in each of these cases there is language which goes beyond the decision, and tends to support the plaintiff's contention. The later case merely adopts the language of the earlier one. But in each of the cases, the question before the court was whether the gas fixtures, upon the evidence, could be ruled as matter of law to be a part of the realty. The decision was simply that they could not. We have not been referred to any case in which the court has decided that gas fixtures attached to a building and used with it are, as matter of law, personal property. They may or may not be, according to the facts and circumstances which tend to show that they do or do not belong to the building, and were or were not intended to remain with it as a part of it. As to the gas fixtures, the steam radiators, the kitchen range and the window screens and door screens, the judge was right in submitting the questions to the jury, with proper instructions. *Allen* v. *Mooney*, 180 Mass. 155. *Ridgeway Stove Co.* v. *Way*, 141 Mass. 557. *Jennings* v. *Vahey*, 183 Mass. 47.

The gas stove and the window shades, running on rollers, stand differently. It may be that certain apartment houses, or other dwelling houses designed for occupation by tenants, are constructed in some of our cities and intended to be used in such a way that the introduction of such gas stoves and window shades by the owner, to go with the house as a part of it, for use by the tenants, may hereafter be proved at a trial. See *Jennings* v. *Vahey*, 183 Mass. 47. It is entirely possible that the mode of construction and use of certain kinds of houses may be such that articles of this kind will be made a part of the house for permanent retention and use in the places where they are put. If it becomes a practice to build and use houses in such a way these articles may be put in as fixtures. As to the application of the law, we agree with Lord Halsbury in what he said in *Leigh* v. *Taylor*, [1902] App. Cas. 157, 161, in regard to the decisions of the courts: "The facts have been regarded in different aspects, according to the fashion of the times, the mode of ornamentation, and the mode in which houses were built, and the degree of attachment which from time to time became neces-

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sary or not, according to the nature of the structure which was being dealt with."

In the present case we discover no evidence to warrant the jury in finding that the gas stove and window shades were a part of the realty. So far as appears, the building in question was an ordinary dwelling house for a single family, and there is nothing to show that it was intended to be occupied or used differently from common dwelling houses. These were ordinary articles of merchandise, not peculiarly fitted for use in this house, were of a standard pattern, loosely affixed and easily removed, and were of the nature of personal property. They were put into the house by the mortgagor, and were of a kind of articles which usually are carried away by an outgoing occupant. There was nothing to show that the owner intended to annex them as a permanent addition to the real estate. We think upon the evidence, the judge was wrong in submitting to the jury the question whether they were a part of the realty.

Exceptions sustained.

C. HENRY KIMBALL *vs.* POST PUBLISHING COMPANY.

WILLIAM GALLETLY *vs.* SAME.

C. HENRY KIMBALL *vs.* BOSTON TRANSCRIPT COMPANY.

WILLIAM GALLETLY *vs.* SAME.

Suffolk. January 10, 1908. — June 15, 1908.

Present: KNOWLTON, C. J., HAMMOND, LORING, & SHELDON, JJ.

Libel and Slander.

A fair report in a newspaper of pending judicial proceedings is privileged, and this privilege extends to the publication of the charges made in a bill in equity where a special order has been made by the court that the defendants shall appear and show cause why they should not be enjoined.

The publication in a newspaper of a fair report of the proceedings at a business meeting of the stockholders of a private corporation is not privileged, and it is no defense to an action for libel for such a publication that the matter complained of as libellous was contained in the remarks of a stockholder at the meeting which he was privileged to make because they related to a matter in which he and the other stockholders had an interest.

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In an action for libel against the proprietor of a newspaper for publishing a report of a meeting of the stockholders of a private corporation in which the plaintiffs were charged with procuring fraudulently a majority of the stock of the corporation, it is no defense that the charge is the same as one made in a bill in equity in a pending suit, a statement of which was published at the same time and was privileged as a fair report of a judicial proceeding.

FOUR ACTIONS OF TORT FOR LIBEL, the first two by different plaintiffs against the Post Publishing Company and the last two by the same plaintiffs against the Boston Transcript Company. Writs dated January 17, 1903, and January 12 and September 27, 1904.

In the Superior Court the cases were tried together before *Bishop*, J. The character of the charges contained in the publications complained of is stated and described in the opinion. The judge instructed the jury as follows:

"The questions upon which evidence has been taken before you are two: first, as to whether there was on the part of the defendants malice towards the plaintiff in these articles; and, secondly, whether the articles were or were not a fair statement of the meeting and of what they purport to state concerning the legal proceedings. And upon such consideration as I can give to this case I rule to you that there is no sufficient evidence of malice in this case, nor that the articles in question are not fair accounts of the meeting and of what they purport to state of the bill in equity, to warrant a verdict for the plaintiff, and that independently of such evidence the publications are privileged and the plaintiff is not entitled to a verdict, and I direct you, gentlemen, to return verdicts for the defendants in these cases."

In accordance with this direction the jury returned verdicts for the defendants; and the plaintiffs alleged exceptions.

H. N. Allin, for the plaintiffs.

J. T. Pugh, for the defendants.

HAMMOND, J. The articles of which the plaintiffs complain contained reports of certain proceedings in court and also of a meeting of stockholders of a corporation called the Burrows Lighting and Heating Company.

So far as respects the report of the court proceedings the articles were privileged. This case differs materially from *Cowley* v. *Pulsifer*, 137 Mass. 392. In that case there had been no action by the court. Here the bill had been presented to the court,

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and the court had acted upon it so far as to make a special order that the defendants therein should appear and show cause why they should not be enjoined. This act of the court was a judicial proceeding and, whatever might formerly have been the rule, it was a subject for a privileged report, although the cause had not yet been finished. It was an act begun in a case, and in the end there must be a final decision. The words of Esher, M. R., in *Kimber* v. *Press Association*, L. R. [1893] 1 Q. B. 65, 71, seem to us to be a true statement of the law on this subject: "I am, therefore, of opinion that where the proceedings are such as will result in a final decision being given, a fair and accurate report, made *bona fide*, of those proceedings is privileged, although it be published before the final decision." And in that case the rule was applied to the proceedings upon an *ex parte* application for the issue of a summons on a charge of perjury. If this were not so then in the language of Lord Esher, "The ridiculous result would follow that, where the trial of a case of the greatest public interest lasted fifty days, no report could be published until the case was ended." *Kimber* v. *Press Association*, L. R. [1893] 1 Q. B. 65, 71, and cases cited. *Metcalf* v. *Times Publishing Co.* 20 R. I. 674, and cases cited. *McBee* v. *Fulton*, 47 Md. 403. *Ackerman* v. *Jones*, 37 N. Y. Sup. Ct. 42. *Stuart* v. *Press Publishing Co.* 83 App. Div. (N. Y.) 467. See also the instructive case of *Usill* v. *Hales*, 3 C. P. D. 319, for a general discussion of the law upon this matter.

The articles in question contained among others the following statements: "At the office of C. Henry Kimball, 97 Haverhill Street, officers, stockholders and lawyers interested in the Burrows Lighting & Heating Company met this morning. The affairs of the Burrows Lighting & Heating Company have been before the public for a considerable time and are apparently in a badly tangled condition. An order of notice was recently issued by the Superior Court against C. Henry Kimball, William Galletly and the Burrows Lighting & Heating Company, ordering them to appear in court on Thursday of this week to show cause why they should not be restrained from holding any meeting. The charges were that the holders of a majority of the capital stock of the company had fraudulently secured control over 416,000 shares of stock."

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By an inspection of the bill in equity and of the order of the court it appears that the statement in the articles was a fair report of the court proceedings. And we are further of opinion that the ruling that the evidence did not warrant a finding of malice was correct. So far, therefore, as the plaintiff attempted to hold the defendants as to so much of the articles as related to the proceedings in court they failed to make out a case.

But there was something more in the articles than the report of the proceedings in court. There was a report of the meeting of the stockholders of a private corporation; and unless this part of the report is also privileged the defense, so far as resting upon that ground, must fail. It is argued by the defendants that "the public is interested and concerned in a meeting of stockholders of a corporation such as is described in the" articles in question, and that reports of such meetings are privileged if fair and made without malice. But the difficulty with this argument is that unless modified by statutory provision the law in England and in this Commonwealth always has been otherwise. It is to be noted that we are not dealing with what is said at the meeting nor with the person who said it. No doubt a stockholder at such a meeting, speaking to stockholders, may with impunity say things derogatory to an officer or the manager of the company provided that what he says be pertinent to the matter in hand and he speaks in good faith and without malice. His justification rests upon the fact that he is speaking to the stockholders upon a subject in which he and they have an interest.

On the contrary we are dealing with a report in the nature of a repetition of the defamatory remarks, which report is made by a stranger, having no interest in the question, to other strangers, called the public, equally without interest. It is manifest that the grounds for the privilege under which the original speaker, the stockholder, is protected cannot serve the publisher of the report. *Davison* v. *Duncan*, 7 El. & Bl. 229. *De Crespigny* v. *Wellesley*, 5 Bing. 392. The privilege of the publisher, if any he has, must rest upon other grounds.

It is stated by some authorities that by the common law of England reports of judicial and parliamentary proceedings alone were privileged. While it is said by Shaw, C. J., in *Barrows* v.

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Bell, 7 Gray, 301, that this statement, unqualified, is too broad, still subsequent decisions seem to show clearly that in England the principle of privilege is confined to reports of judicial or *quasi* judicial bodies. No privilege was attached to the report of other public unofficial meetings. Hence, if in such a case a report containing any defamatory statement of fact was printed in a newspaper the proprietor's only defense was that the statement was true. *Purcell* v. *Sowler*, 1 C. P. D. 781; 2 C. P. D. 215. See also Odgers, Libel & Slander, (4th ed.) Appendix B, and the authorities therein cited. Since the decision in this last case the law has been somewhat modified so far as respects official and other public meetings. But these statutes have been somewhat strictly construed, and even now a fair report is not always safe. *Ponsford* v. *Financial Times*, 16 T. L. R. 248.

The subject was quite freely discussed by Shaw, C. J., in *Barrows* v. *Bell*, *ubi supra*, and the following language was used (p. 313): "Whatever may be the rule as adopted and practised on in England, we think that a somewhat larger liberty may be claimed in this country and in this Commonwealth, both for the proceedings before all public bodies, and for the publication of those proceedings for the necessary information of the people. So many municipal, parochial and other public corporations, and so many large voluntary associations formed for almost every lawful purpose of benevolence, business or interest, are constantly holding meetings, in their nature public, and so usual is it that their proceedings are published for general use and information, that the law, to adapt itself to this necessary condition of society, must of necessity admit of these public proceedings, and a just and proper publication of them, as far as it can be done consistently with private rights. This view of the law of libel in Massachusetts is recognized, and to some extent sanctioned, by the case of *Commonwealth* v. *Clap*, 4 Mass. 163, and many other cases." And it was held that the publication by a member of the Massachusetts Medical Society of a true account of the proceedings of that society in the expulsion of another member for a cause within its jurisdiction, and of the result of certain suits subsequently brought by him against the society and its members on account of such expulsion, is privileged.

The above language of the court, however liberal its construc-

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tion, is not to be understood as applying to strictly private meetings. It applies at the most only to meetings public in their nature, or where the proceedings concern the public. In that case it was said that the charter of the Massachusetts Medical Society "invested the society, their members and licentiates, with large powers and privileges, in regulating the important public interest of the practice of medicine and surgery, enabled them to prescribe a course of studies, to examine candidates in regard to their qualifications for practice, and give letters testimonial to those who might be found duly qualified." It was also stated that it appeared by the acts incorporating this society that it was regarded by the Legislature "as a public institution, by the action of which the public would be deeply affected in one of its important public interests, the health of the people." It was further said that the proceedings of which the report was made "might be rightly characterized, as in the case of *Farnsworth* v. *Storrs*, [5 Cush. 412] as *quasi* judicial." And it was upon the latter ground that the communication was adjudged to be privileged.

The case before us is entirely different. The meeting was simply that of a private corporation invested with no privileges and owing no special duties to the public. It was an ordinary business meeting. Whether any member was in fraudulent possession of stock, or had mismanaged the affairs of the corporation, or whether the plaintiffs were unfit to continue as officers, or the corporation had been made bankrupt, were matters with which the public were in no way concerned. The meeting was for the stockholders alone. Only they or their duly constituted agents were entitled to be present. The meeting was neither public nor for a public purpose. As well might it be said that a private conference between the members of a partnership on partnership matters was a public meeting. For the purposes of the meeting it might have been necessary for charges to be made by one stockholder against another stockholder or an officer, and that the charges should be discussed and their truth or falsity determined; and so far the actors were well within the privilege. They had a duty to perform in a matter in which all were interested. But for obvious reasons hereinbefore stated the mantle of protection cannot cover him who, having no interest, repeats

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the defamatory words to others also without interest. And in this matter the conductor of a newspaper stands no better than any other person. As was said in *Sheckell* v. *Jackson*, 10 Cush. 25, 26, 27, in reply to a contention that conductors of the public press are entitled to peculiar indulgence and have especial rights and privileges, " the law recognizes no such peculiar rights, privileges, or claims to indulgence. They have no rights but such as are common to all. They have just the same rights that the rest of the community have, and no more." These words, although spoken more than half a century ago, state the law as it exists to-day, except so far as it has been modified by statute, and there has been no statute material to the question before us. The result is that the articles were not privileged so far as they reported the proceedings of the corporation.

It is argued by the defendants that inasmuch as the charge in the bill in equity was the same as that made at the meeting, namely, that the majority of the stock was in the fraudulent possession of the plaintiffs, it will be impossible for the plaintiffs to contend that any alleged damage was suffered from the one rather than from the other, and therefore if one report is privileged the action cannot be maintained. This is untenable. Even if the charge in substance is the same, it is evident that a charge made in a bill in equity filed in court may not be regarded as so serious a matter as a charge made by one's business associates in a business meeting. The difficulty of separating the damages gives no immunity to the defendants.

Exceptions sustained.

MARIA M. DI BARI *vs.* J. W. BISHOP COMPANY.

Worcester. February 24, 1908. — June 15, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Negligence, Employer's liability.

In an action under R. L. c. 106, § 73, by the widow of a workman against a general contractor, for causing the instantaneous death of her husband, while he was working as one of a gang of men in the employ of the defendant in attempting

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to erect a heavy pole, from the pole suddenly falling upon him, there was evidence that the plaintiff had been in this country about two months, that he did not speak or understand English, that before his employment by the defendant he had worked as a laborer in shovelling and picking, and that he went to work on the job the day before he was killed, having had previously no experience in this kind of work. There was nothing to show that he was not doing in the usual way the work which he had been set to do, and there was evidence that, if any warning was given by the defendant's superintendent, the plaintiff's husband failed to understand it, and that from want of experience he did not appreciate the danger of poles falling. There also was evidence warranting a finding that his failure to avoid the danger might have been due to confusion on his part resulting from the imminence of the peril and his want of experience. *Held*, that the plaintiff's husband did not assume the risk of such an accident, and that the question of his due care was for the jury, upon which they might consider the fact that the other workmen escaped and that the plaintiff's husband perhaps might have escaped also if he had been less confused or had moved more quickly, but that it could not be ruled as matter of law that he was wanting in due care because in a moment of sudden peril he failed to use the best means of escape.

It is the duty of an employer toward his workmen to furnish a sufficient number of workmen to do the work required of them.

In an action under R. L. c. 106, § 73, by the widow of a workman against a general contractor, for causing the instantaneous death of her husband, while he was working in the employ of the defendant as one of a gang of six men under a foreman in attempting to erect a heavy pole, thirty feet high above the ground and sixteen or eighteen inches in diameter at its base, from the pole suddenly falling upon him, there was evidence warranting the jury in finding that the defendant did not furnish a sufficient number of men to enable those engaged in erecting the pole to do so in safety and that such negligence was the proximate cause of the death of the plaintiff's husband. *Held*, that the question of the defendant's negligence was for the jury.

TORT under R. L. c. 106, § 73, by the widow of Pietro Di Bari against a general contractor, for causing the instantaneous death of her husband on December 30, 1905, while he was working as one of a gang of men in the employ of the defendant. Writ dated March 31, 1906.

In the Superior Court the case was tried before *Gaskill*, J. The facts which the jury were warranted in finding on the evidence are stated in the opinion. The plaintiff's husband was killed by the falling of a heavy pole, about thirty feet high above the ground and sixteen or eighteen inches in diameter at its base, when six men under the direction of a foreman were attempting to erect it.

The judge refused to order a verdict for the defendant, and refused to rule that there was no evidence that an additional number of men would have prevented the accident.

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Among other instructions to the jury, the judge gave the following to which the defendant excepted:

"First, was the defendant corporation negligent in not providing a greater force of men to do the work of raising the pole? You have heard the evidence upon the one side and the other, as to the usual and customary method of doing the work. So far as the method is concerned that need not be a matter for you to consider especially. You have heard also upon one side and the other evidence as to the usual and ordinary course as to the number of men required to do work similar to this.

"Now, you must be satisfied by a fair preponderance of the evidence, in order to maintain that proposition, that a less number of men than was the usual and ordinary complement furnished and required to be furnished by an employer for work of this character under these conditions was furnished in this case. If you are satisfied that under these conditions the number of men furnished by Bishop and Company was a sufficient number of men, then that is an end so far as that proposition is concerned, of the plaintiff's case.

"If you are satisfied that a less number of men was furnished then that is not enough to give the plaintiff a verdict. You must be satisfied that that failure to furnish more men was the proximate cause of the death of the plaintiff's husband. So it becomes important for you in that connection to inquire what was the exact situation which caused the death of Di Bari. If you are satisfied that it was by reason of one of the spikes in the jack settling into the ground, it is for you to say whether a larger number of men could in the first instance have prevented that, or in the second instance if they could not have prevented that, can you say that they would have prevented this pole from falling in the way in which it did?"

The jury returned a verdict for the plaintiff in the sum of $1,000; and the defendant alleged exceptions.

The case was submitted on briefs.

E. H. Vaughan, E. T. Esty & J. Clark, Jr., for the defendant.

G. S. Taft & G. R. Stobbs, for the plaintiff.

MORTON, J. As this action finally went to the jury there were two questions for them to consider: first, whether the plaintiff's husband was in the exercise of due care or had as-

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sumed the risk; and secondly, whether the defendant or its superintendent was negligent in not providing more men to do the work and, if they were negligent, whether such negligence was the cause of the death of the plaintiff's husband. There was a verdict for the plaintiff, and the case is here on exceptions by the defendant to the refusal of the judge to direct a verdict in its favor, and to the instructions which the judge gave in regard to the second question.

It could not have been ruled as matter of law that the plaintiff's husband was not in the exercise of due care, or that he assumed the risk. There was testimony tending to show that he had been in this country only about two months, that he did not speak or understand English, that he had worked as a laborer in shovelling and picking; and that he went to work on the job the day before he was killed, having previously had no experience in that kind of work. There is nothing to show that he was not doing in the usual way the work which he was set to do. And there was evidence warranting the jury in finding that, if any warning was given by the superintendent, the deceased failed to understand it, and that from want of experience he did not appreciate the danger of the pole's falling, and therefore did not assume the risk. There also was evidence warranting them in finding that his failure to avoid the danger may have been due to confusion on his part resulting from the imminence of the peril and his want of experience. The fact that the others escaped and that he might, perhaps, have done so if he had been less confused or had moved more quickly was a matter for the consideration of the jury in passing upon the question of his due care. It could not be ruled as matter of law that he was wanting in due care because in a moment of sudden peril he failed to use the best means of escape. *Olsen* v. *Andrews*, 168 Mass. 261.

We see no error in the instructions in regard to the matter of alleged negligence on the part of the defendant in failing to supply a sufficient number of workmen for the erection of the pole in safety. Such negligence stands on the same footing as negligence in furnishing suitable appliances. In a sense workmen are appliances. If a master knowingly employs servants who are incompetent by reason of their habits or otherwise he is liable for an injury occasioned to a fellow servant by their incom-

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petency just as he would be liable for an injury caused by a defective machine. *Gilman* v. *Eastern Railroad*, 13 Allen, 433. *McPhee* v. *Scully*, 163 Mass. 216. And on principle we do not see why a master should not also be held liable for injuries resulting from his negligence in failing to furnish a suitable number of servants to do the work required of them. There was evidence warranting the jury in finding that a sufficient number of men was not furnished by the defendant to enable those engaged in erecting the pole to do the work in safety, and that such negligence was the proximate cause of the death of the plaintiff's husband.

Exceptions overruled.

GEORGE E. DUDLEY *vs.* CHARLES B. KINGSBURY.

Hampden. February 24, 1908. — June 15, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Negligence. Automobile.

In an action by a conductor of an open street railway car for personal injuries from a collision with an automobile delivery van owned and driven by the defendant, if it appears that when the collision occurred the plaintiff was on the running board of his car collecting fares from the passengers, and that the defendant's automobile was disabled and without motive power and had moved very slowly from a sidewalk toward the tracks of the street railway as the car on which the plaintiff was conductor was approaching, the question whether the plaintiff should have seen and guarded against the danger of a collision and should have exercised more supervision over the motorman or whether taking all the circumstances into account he was in the exercise of due care is for the jury.

In an action by a conductor of an open street car for personal injuries from a collision with an automobile delivery van owned and driven by the defendant, where it appeared that when the collision occurred the plaintiff was on the running board of his car collecting fares from the passengers, and that the defendant's automobile was disabled and without motive power and had moved very slowly from a sidewalk toward the tracks of the street railway as the car on which the plaintiff was a conductor was approaching, it was *held*, that, assuming in the defendant's favor that if negligence of the motorman caused or contributed to the collision the plaintiff could not recover, the questions whether on the facts shown by the evidence the motorman should have discovered the plight of the defendant's automobile before he did and whether he exercised proper care in the way in which he operated the car after he did discover it were for the jury.

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In an action by a conductor of an open street railway car for personal injuries from a collision with an automobile delivery van owned and driven by the defendant, it appeared that the defendant had attempted to turn his automobile from one street into another with an up grade, that in doing so the wheel of the automobile dropped into a depression or gutter, which caused the driving chain to be thrown off from the rear sprocket, and left the automobile without motive power and incapable of control by the ordinary brake, that owing to the steepness of the street at that point the automobile started backward into and down the first street, that the defendant tried to stop it by turning it against the curbstone, but that its momentum carried it over the curbstone, across the sidewalk and against a terrace or bank, that it then recoiled from the bank and started forward very slowly across the sidewalk into the street and toward the street railway tracks as the car of which the plaintiff was conductor was approaching, and the collision occurred. The defendant testified that he tried to stop his automobile by using the emergency brake but that it would not work, because it was smeared with oil from the chain that had fallen on it when thrown off from the sprocket. There was testimony which, if believed, tended to show that the accident might have been avoided by the use of the emergency brake at the proper time. The plaintiff contended that the defendant was negligent in his manner of driving his automobile and particularly in not using the emergency brake. *Held*, that it was for the jury to give such weight as they saw fit to the defendant's testimony and his explanation of the failure of the emergency brake to work, and that it was also for them to say whether the defendant exercised due care in turning the corner as he did, and whether, if he was negligent in this, such negligence contributed to the accident, and generally that the question of the defendant's negligence was for the jury.

TORT for personal injuries received by the plaintiff on June 24, 1905, in Springfield through a collision of an open electric car of which the plaintiff was the conductor with an automobile owned and operated by the defendant. Writ dated October 4, 1905.

In the Superior Court the case was tried before *Pierce*, J. At the time of the accident the plaintiff was standing upon the running board of his car collecting fares from the passengers. The automobile was at the time disabled. It was a Knox delivery van twelve feet long, seven and a half feet high and four feet wide, weighing three thousand pounds. Just before the accident the defendant had attempted to turn the automobile from Belmont Avenue into Leyfred Terrace. As he did so, the wheel of the automobile dropped into a depression or gutter which ran along the cross walk at the entrance to Leyfred Terrace, and so far threw the sprockets of the automobile out of alignment that the driving chain was thrown off from the rear sprocket. This left the automobile without motive power, and incapable of control by the ordinary brake. Owing to the declivity of the street

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at that point the automobile started backward and down Belmont Avenue. The defendant retained his seat in the automobile, and endeavored to stop it by running it against the curbstone. But, instead of stopping, the automobile was carried by its momentum over the curbstone, across the sidewalk and against a terrace or bank. It then recoiled from the bank and started forward very slowly across the sidewalk into the street and toward the street railway tracks. The defendant testified that as the street car of which the plaintiff was conductor was approaching he tried to stop the automobile by using the emergency brake but that it failed to work, for the reason that its friction device, upon which the chain had fallen when it was thrown off, had become smeared with the lubricant with which the chain was covered. The plaintiff contended that the defendant was negligent in his manner of driving his automobile and particularly in not using the emergency brake instantly when one wheel was in a deep gutter. The other questions in the case and the special findings of the jury are stated in the opinion. The judge refused to rule that the plaintiff was not entitled to recover and also refused to make the other rulings requested by the defendant. The jury returned a verdict for the plaintiff in the sum of $510; and the defendant alleged exceptions.

The case was submitted on briefs.

W. H. Brooks & W. Hamilton, for the defendant.

J. McKean, for the plaintiff.

MORTON, J. The plaintiff was a conductor in the employ of the Springfield Street Railway Company. While on the running board of a car in the act of collecting fares, he was injured by a collision between an automobile owned and managed by the defendant and the car. This is an action to recover for the injuries so received. There was a verdict for the plaintiff, and the case is here on exceptions by the defendant to the refusal of the judge to give various rulings that were requested.

There are three questions: (1) As to the plaintiff's due care, (2) as to the negligence of the motorman of the car, and (3) as to the defendant's negligence. To questions put to them by the presiding judge after they had returned their verdict, the jury answered, that the plaintiff and the motorman were in the exercise of due care, and that the defendant

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was negligent. We think that the case was rightly submitted to the jury and we discover no error in regard to the instructions that were given or refused.

1. As to the plaintiff's due care. The plaintiff was where he had a right to be and was engaged in the performance of his duty, and whether he should have seen and guarded against the danger of a collision and have exercised more supervision over the motorman, and whether, taking all of the circumstances into account, he was in the exercise of due care was plainly for the jury.

2. As to the negligence of the motorman. We assume in the defendant's favor that, if the motorman's negligence caused or contributed to the collision, the plaintiff cannot recover. *Yarnold* v. *Bowers*, 186 Mass. 396. *Allyn* v. *Boston & Albany Railroad*, 105 Mass. 77. The instructions on this point were, to say the least, sufficiently favorable to the defendant. We do not see how it could have been ruled as matter of law that the motorman was negligent. The question of due care or negligence is ordinarily one for the jury. When the facts are undisputed it becomes one of law. In this case it was for the jury to determine what the facts were and then to decide whether they showed that the motorman was or was not negligent. Whether he should have discovered the plight of the automobile before he did and whether he exercised proper care in the way in which he operated the car after he did discover it, were clearly questions for the jury.

3. As to the defendant's negligence. There was testimony which, if believed, tended to show that the accident was due to failure on the defendant's part to use the emergency brake, in other words to what might be found to be negligence in the manner in which he operated the car. It was for the jury to give such weight as they saw fit to his testimony and explanations in relation thereto. It was also for them to say whether he exercised due care in turning into Leyfred Terrace as he did and whether, if he did not, such want of due care on his part contributed to the accident. The question of the defendant's negligence, like that of the plaintiff's and the motorman's due care, was for the jury. It could not be ruled as matter of law that there was no evidence of negligence on his part.

Exceptions overruled.

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CHARLES W. BOYD, petitioner.

Middlesex. March 3, 1908. — June 15, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Practice, Civil, New trial, Memorandum of judge, Exceptions.

If a judge, who presided at a trial and has made an order setting aside the verdict as against the evidence and the weight of evidence and granting a new trial, files a memorandum setting forth the grounds of his decision, such memorandum of the exercise of his discretion is not properly a part of the record, and there is nothing to prevent the judge from altering it, adding to it or even wholly withdrawing it at any time during the pendency of the proceedings before him, and he may make the alteration or addition in a certificate appended to a bill of exceptions which he disallows or in such other form as seems to him best, the matter being entirely within his discretion and control.

An order of the judge who presided at a trial setting aside the verdict as against the evidence and the weight of evidence and granting a new trial is conclusive and is not the subject of exception.

MORTON, J. This is a petition to establish the truth of exceptions duly filed in the case of *Boyd* v. *Taylor et al.* by the petitioner who was the plaintiff in that action and disallowed by the judge who presided at the trial of that case. The petition was sent to a commissioner who has made a report finding in effect that the bill of exceptions as filed by the petitioner was true as to all material matters, but excluding evidence offered in regard to certain matters contained in the bill on the ground that such matters were immaterial. The petitioner does not contest the correctness of this ruling by the commissioner, and nothing more need be said about it.

We pass to the question presented by the bill of exceptions. The plaintiff (the petitioner) had a verdict in the case of *Boyd* v. *Taylor* of $5,250. The defendants filed a motion to set it aside, and after due hearing the following entry was made by direction of the judge who presided at the trial, "Verdict set aside and new trial granted." The presiding judge made at the same time the following memorandum on the motion for a new trial: "The finding of the jury that Dunton had any real or ostensible authority from the defendants to set Boyd at work on the machine was against the evidence and the weight of the evi-

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dence. If the plaintiff suffered from any negligence in this case, the weight of the evidence disclosed it was the negligence of a fellow servant." On receiving notice of the decision the plaintiff at once wrote to the presiding judge asking him to save his exception to the ruling granting the defendant's motion for a new trial, quoting in his letter the memorandum of decision as the ruling referred to. To this letter the justice replied saying that his ruling was upon a question of fact and that he did not think that the plaintiff had an exception as a matter of right and declining to save an exception as the plaintiff requested. Thereupon the plaintiff prepared and filed the bill of exceptions which this petition was brought to establish the truth of. After due hearing the judge disallowed the exceptions, appending thereto the following certificate: "In my memorandum indorsed on the motion for a new trial I stated one prominent reason for my action which I hoped would convince the counsel for the plaintiff that I had some basis for granting the motion. The verdict was set aside for other reasons in addition to that expressed in the memorandum."

"In my opinion the weight of evidence showed that the risk of dangerous consequences in operating the machine was obvious; that the plaintiff by reason of his age, knowledge and capacity could have appreciated such danger by the exercise of reasonable care and that he required no more instruction as to such risk than he had received from observation and the statements of Dunton."

"The verdict of the jury, in my opinion, was contrary to such weight of the evidence. If I had not set aside the verdict on the question of liability, I considered the verdict excessive in the sum of $2,000, and should have granted the plaintiff opportunity to remit that sum, and on his failure so to do should have set the verdict aside."

"As I consider all such findings by me as to the evidence and the weight of the evidence and my conclusions and reasons for setting aside the verdict matters of judicial discretion which I have attempted to exercise to the best of my ability, I disallow this bill of exceptions."

The petitioner contends in effect that the presiding justice was limited in the statement of his reasons for granting the motion

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for a new trial to those indorsed on the motion, and that the reasons there stated present a ruling on questions of law which he is entitled to have reviewed on exceptions.

But we do not think that the presiding judge was limited to the reasons indorsed on the motion. The filing of the memorandum was entirely voluntary on his part. He was under no obligation to make a statement of his reasons for granting the motion, and might properly enough have contented himself with simply directing the entry to be made of "Verdict set aside and new trial granted." It is often, however, more satisfactory to parties and counsel to know the grounds on which the judge bases his action, and it is not infrequent for a judge in regard to matters of discretion as well as in regard to other matters to file a memorandum setting forth the grounds of his decision in regard to the matter before him. Such a memorandum does not constitute in any proper sense a part of the record, and there is nothing to prevent the judge from altering it or amending it or adding to it at any time at least during the pendency of the proceedings before him, or even from wholly withdrawing it. He may make the amendment or alteration or addition in the form of a certificate appended to a bill of exceptions which he disallows, or in such other form as seems to him best. However or wherever made it is a matter entirely within his discretion and control and altogether different from the findings of fact provided for by R. L. c. 159, § 23. It is manifest that the verdict was set aside on grounds which are not reversible here and to which no exception lies.

Exceptions overruled.

H. J. Coolidge, (*J. Noble, Jr.*, with him,) for the petitioner.

P. S. Maher, for the respondents, submitted a brief.

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CLARK POWERS *vs.* MALCOLM E. STURTEVANT.

Suffolk. March 3, 1908. — June 15, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Officer. Arrest. Assault and Battery.

An officer making an arrest which he is authorized to make has a right to use such force as is reasonably necessary to overcome resistance, but if he uses unreasonable or excessive force he is liable in an action of tort for assault and battery, and in such an action, if it is shown that the force used by the defendant was excessive, it is no defense that he acted without malice and in the honest belief that the force which he used was necessary.

MORTON, J. This is an action of tort for an alleged assault. There was a verdict for the plaintiff and the case is here on exceptions by the defendant to the refusal of the presiding judge to give certain instructions that were requested and to certain instructions that were given. Exceptions were also taken to the exclusion of certain evidence, but they have not been argued, probably for the reason that testimony to the same effect was subsequently admitted, and we therefore treat them as waived.

The defendant was a constable of the city of Somerville and attempted to justify the alleged assault as an arrest which he had the right to make under a warrant issued by the collector of taxes of said city directing him to distrain the goods or take the body of the plaintiff in satisfaction of a poll tax which was assessed upon him for the year 1898 and which he had neglected to pay. The plaintiff contended, however, that, if the defendant had authority to make the arrest, which he denied, he used excessive force for which he was liable; and that is the question presented by the exceptions.

The defendant in addition to asking the judge to rule, that on all the evidence the plaintiff could not recover, in substance requested the judge to instruct the jury that the defendant was the sole judge of the propriety and necessity of the power to be used in making the arrest, and that if he exercised his best judgment and acted in good faith and without malice, he was

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not liable for the use of such force as he deemed necessary. The presiding judge declined to rule and instruct the jury as thus requested but instructed them, in effect, that the defendant had a right to arrest the plaintiff and that it was the plaintiff's duty to go with him; and, if the plaintiff refused to go, the defendant had a right to use reasonable force to overcome the plaintiff's resistance but had not the right to use unreasonable and unnecessary force or to wantonly or maliciously injure the plaintiff. The presiding judge further instructed the jury that if an officer was an honest man and was performing his duty and engaged in administering the law he would perhaps under ordinary conditions be in a position to judge better than the judge or the jury as to the force required and should be allowed considerable discretion and that that should go for something if he acted fairly and honestly without malice, or intention to injure or hurt the plaintiff. Other instructions were given in illustration and explanation of how far an officer could or could not go in the use of force in making an arrest. But taking the charge as a whole it is plain, we think, that it was as favorable to the defendant as he had any right to expect.

The evidence of the plaintiff tended to show, if believed, that there was a gross and wanton assault, and the ruling that on all the evidence he was not entitled to recover was properly refused. The judge also properly refused to instruct the jury that the defendant was the sole judge of what force was necessary. The defendant had the right as the judge instructed the jury to arrest the plaintiff and to use such force as was reasonably necessary to overcome any resistance which he offered; but the defendant had not the right to use unreasonable or excessive force and, if he did, he is liable to the plaintiff for any injury suffered in consequence thereof. If there are any decisions in other jurisdictions which imply or lay down a contrary rule they cannot be regarded, we think, as sound law. The question is not whether the defendant acted without malice and in the honest belief that the force which he used was necessary, but whether under the circumstances the force used was in fact unreasonable and excessive; if so, to the extent of such excess it was unwarranted and unjustifiable, and the defendant was liable therefor. See *Stone* v. *Lahey*, 133 Mass. 426; *Commonwealth* v. *Clark*, 2 Met.

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23; *Hannen* v. *Edes*, 15 Mass. 347; *Imason* v. *Cope*, 5 C. & P. 193; *Levy* v. *Edwards*, 1 C. & P. 40.

Exceptions overruled.

W. Keyes, for the defendant.
E. M. Brooks, for the plaintiff.

MILLIE B. CHESWELL *vs.* FRATERNAL ACCIDENT ASSOCIATION OF AMERICA.

Suffolk. March 3, 1908. — June 15, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Insurance, Accident. *Payment*. *Evidence*, Presumptions and burden of proof.

In an action on a policy of accident insurance by the widow of the insured to recover the amount payable upon his death from injuries due to an accident of the kind covered by the policy, the terms of the policy required the plaintiff to show that the death of the insured was due to the accident alone. The physician who attended the insured after the accident testified that in his opinion the accident was the sole cause of death. There was testimony of the plaintiff and others as to the appearance and condition of the insured before and after the accident which the jury could find tended to support the same conclusion. There was testimony as to whether the insured had been suffering from diabetes, and an attending physician testified that he was unable to tell whether the accident was the sole cause of death or not. There also was in evidence an application by the insured to the defendant for a weekly indemnity under the policy made at a time when he supposed that he had recovered from his injuries. *Held*, that the question whether the accident was the sole cause of the death of the insured was one eminently for the jury and that a finding by them that such was the case was warranted by the evidence.

In an action on a policy of accident insurance by the widow of the insured to recover the amount payable upon his death from injuries due to an accident of the kind covered by the policy, it appeared that the insured had applied to the defendant for a weekly indemnity for his loss of time resulting from the accident which caused his death, and in his application had agreed that the indemnity when paid should be in full discharge of any and all claims under his policy against the defendant on account of the injuries in question and should release and forever discharge the defendant from all liability under the policy on account of those injuries. There was evidence that a letter containing a check for the amount claimed by the insured as weekly indemnity, properly addressed to the insured with a return imprint on the envelope in which it was enclosed and with postage prepaid, was mailed to the insured by the defendant's treasurer a few days before the death of the insured and that it never had been returned to the defendant. The defendant admitted that the check never had been used by the insured, and the plaintiff testified that she never had seen it, and that after the death of the insured she examined his clothes and pocket book and looked

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through his effects and found no check of the defendant. *Held*, that on this evidence the jury would be warranted in finding that the check never had been received by the insured and consequently that the weekly indemnity to which he made claim never had been paid to him.

CONTRACT by the widow of William T. Cheswell, the chief of the fire department of the city of Boston, upon a policy of accident insurance to recover $1,250 and interest alleged to be due under such policy upon the death of the plaintiff's husband on February 15, 1906, alleged to have been caused by his being thrown violently from his carriage while he was responding to an alarm of fire on December 20, 1905. Writ dated July 23, 1906.

In the Superior Court the case was tried before *White*, J. The findings warranted by the evidence are stated in the opinion. At the time the policy was issued the insured was a district chief of the fire department of the city of Boston and at the time of his death was the chief of that department as stated above. It appeared that on December 20, 1905, he was severely injured in the manner stated above and was removed on the same day to the Massachusetts General Hospital, where he was placed under the care of Dr. H. H. A. Beach, and was discharged therefrom, much relieved, on December 29, 1905. He thereupon returned to his home, and remained in his house until January 22, 1906, when he resumed his duties as chief of the fire department. These duties he continued to perform until February 15, 1906, when, in the early morning, while directing his subordinates at a fire on Commercial Street, Boston, he suddenly was taken ill, was removed immediately to the relief hospital in Haymarket Square, and died there in less than three minutes after his arrival. No post-mortem examination was made.

The policy sued upon, omitting the provisions immaterial to the case, was as follows:

"No. 19687 Amount $1250
Age 49 Class 5

Fraternal Accident.
Association of America.
Located at Westfield, Massachusetts, Hampden Co.
Accident Certificate.

"In consideration of the warranties in the application, a copy of which is endorsed hereon, for this certificate and the agree-

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ment on the part of the certificate holder to accept the conditions contained in this certificate as the basis of this contract, and in consideration of five dollars paid by William T. Cheswell of Boston, County of Suffolk, State of Massachusetts, Occupation District Chief Fire Department, the receipt whereof is hereby acknowledged, does hereby constitute the said applicant a certificate holder of said Association and agree to pay to the said certificate holder subject to the terms, qualifications, and conditions in this certificate contained and endorsed on the back hereof, the following sums of money, viz:

"The sum of ten dollars per week for a period not exceeding fifty-two consecutive weeks as indemnity for loss of time resulting from bodily injury so effected during the life of this certificate through external, violent, and accidental means which shall independently of all other causes, immediately and wholly disable him from transacting any and every kind of business pertaining to his occupation above stated.

. . . . . .

". . . And the said Association agree to pay to Mrs. Millie B. Cheswell (wife) if living, if not, to the executors or administrators of said member, in trust however, for and to be forthwith paid over to his heirs at law the sum of Twelve hundred fifty dollars if the death of the certificate holder shall result from such injuries alone within ninety days from the date of said accident. Except that if the insured is injured while engaged temporarily or otherwise in any occupation or exposure classed by this Association as more hazardous than that here given, his insurance and weekly indemnity shall only be so much as the premium paid by him will purchase at the rates fixed for such increased hazard.

"In witness whereof, the Fraternal Accident Association of America has caused this certificate to be signed and sealed by its President and Secretary, at Westfield, Hampden County, Mass., this certificate to take effect at 12 M. Noon this second day of February, 1894.

[Seal] "Jas. Noble, Jr. President,
H. N. Kingsbury, Secretary."

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[Indorsed on back of Certificate.]

"Conditions.

"Third. This Association may cancel this certificate at any time by returning to the certificate holder any and all moneys paid by the certificate holder to the Association, less a pro-rata share for the time it has been in force.

"Fourth. The total liability of this Association on this certificate shall not exceed in any event the principal sum within mentioned, therefore in case of death claim any sums previously paid as indemnity shall be deducted from said principal sum."

"Ninth. This insurance does not cover disappearance nor injuries of which there is no external visible mark upon the body; nor accident, nor death or disability resulting wholly or partly, directly or indirectly, from any of the following causes, or while so engaged or affected:

"Disease or bodily infirmity. Hernia, fits, vertigo, sleep-walking."

The application of the insured to the defendant for weekly indemnity under the policy referred to in the opinion was as follows:

"Westfield, Mass., Feb. 2, 1906.

"I, William T. Cheswell, a resident of Boston, Mass., County of Suffolk, State of Mass., by occupation Chief Fire Dept. holding Policy No. —— in the Fraternal Accident Association of America, do depose and say that on the 20th day of December, 1905, at 12 o'clock M., I received accidental bodily injuries as described in my formal notification of accident, and in proof of my claim for indemnity I make answers to the following questions, which I warrant to be true:

"1. When did you cease to perform the duties of your occupation or profession? Dec. 20th, 1905.

"2. When did you first secure the service of a physician or surgeon? Within five minutes.

"3. What are the duties of the occupation in which you were injured? State them all. To respond to alarms of fire in the City of Boston and take command of the Fire Dept."

"5. Was the accident of such serious nature and extent as to

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prevent you from performing any and all of the duties of your occupation? Yes.

"6. How long were you confined to your house? From Dec. 20 to Jan. 22. To your bed? 9 days at Mass. Gen. Hospital.

"7. If not confined to the house, state how your time was employed. Confined to house.

"8. What duties have you been able to perform in your regular occupation, or otherwise? None.

"9. Were you suffering from any disease or infirmity other than that which was the direct result of the accident during the period for which you claim indemnity? None.

"10. When did you first resume any of the duties of your occupation? Jan. 22nd, 1906.

"11. When did you resume most of the duties of your occupation? Jan. 22nd, 1906.

"12. For what length of time were you wholly disabled and prevented from attending to or performing any part of the duties of your occupation or those of any other remunerative employment? From the 20th day of Dec. 1905, to the 22nd day of Jan. 1906."

"15. I claim full indemnity for 4 weeks, 4 days, at $10. per week, $45.71 and which, when paid, shall be in full discharge of any and all claims under my policy against the Fraternal Accident Association of America on account of the personal injuries aforesaid, and will release and forever discharge the said Association from all liability under Policy or Certificate No. 19687 on account of injuries received on the 20th day of Dec. 1905.

"16. I hereby declare that I am the person insured under Policy No. 19687, and have received personal bodily injuries caused solely by an accident, unforseen, occurring without design or intention, due wholly to violent means, external to the body, and not caused or contributed to by any disease or bodily infirmity whatsoever. I hereby warrant the truth of the answers to all questions contained in this application for indemnity and in the formal notification of accident, and that I have not abstained from my usual occupation, either wholly or partially, longer than was absolutely necessary. That I was not under the influence of intoxicating liquors or narcotics at the

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time of the accident. This statement is made by me with the understanding that by receiving it the Association waives no right on account of my failure to comply with any of the provisions or conditions of the policy or any other defense it may have.

"Wm. T. Cheswell."

This foregoing application was received by the defendant on February 9, 1906, and a letter was written acknowledging its receipt. On February 10, 1906, a check of the defendant for $45.71 payable to the order of the insured was mailed to the insured at his address in Boston in a letter of the same date, signed by N. N. Kingsbury as secretary and treasurer of the defendant, saying, "Enclosed find our draft No. 5603 in full payment of your claim No. 6726 against this association." The postage on this letter was prepaid and the envelope containing it had the defendant's business address in the upper left hand corner. In the defendant's brief was the statement, "This check was not used by Mr. Cheswell during his lifetime and had not been returned at the time of trial in the lower court." The plaintiff testified that she never had seen the check and that after her husband's death she examined his clothes and pocket book and looked through his effects and found no check of the defendant.

At the close of the evidence the judge refused to rule that upon the whole evidence the plaintiff was not entitled to recover and also refused to make other rulings requested by the defendant which have become immaterial because the exceptions founded on their refusal were not argued.

The judge submitted to the jury the following questions, to which the jury returned the answers which are appended:

"Did the death of William T. Cheswell, on February 15th, 1906, result, alone and independently of all other causes, from the injuries which he sustained in consequence of the accident which occurred to him on December 20th, 1905?" "Yes."

"Did William T. Cheswell, in due course of the mail, and in due course of business, receive from the defendant its check for $45.71 in full discharge of any and all claims under the policy set out in the plaintiff's declaration?" "No."

The jury returned a general verdict for the plaintiff in the sum of $1,309.38; and the defendant alleged exceptions.

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A. E. Denison, for the defendant.

R. Homans, for the plaintiff.

MORTON, J. There were two questions in this case, both of fact for the jury under suitable instructions. One was whether the death of the insured was due to the accident alone. The other was whether the insured had received payment of the weekly indemnity to which he made claim. If the death of the insured was not due to the accident alone, then, under the terms of the policy, the plaintiff was not entitled to recover. And if the insured had received payment of the weekly indemnity, then the conditions under which he received it operated to release the association from all further liability under the policy on account of the injuries received by him from the accident. Two questions embodying these issues were submitted by the presiding judge, without objection, to the jury who answered both in favor of the plaintiff, and returned a general verdict for her. The case is here on exceptions by the defendant to the refusal of the presiding judge to give certain instructions that were requested, of which the first, and the only one that has been argued, was, that upon all of the evidence the plaintiff was not entitled to recover.

There clearly was evidence warranting the jury in finding that the accident was the sole cause of death. Dr. Beach, who attended the insured after the accident, testified that in his opinion the accident was the sole cause of death. There was also testimony from the widow and others as to the appearance and condition of the deceased before and after the accident which the jury could properly find tended in the same direction. It was for the jury to give such weight as they saw fit to the fact, if they found that it was a fact, that he had been and was suffering from diabetes, and to the testimony of Dr. Vickery, an attending physician, that he was unable to tell whether the accident was the sole cause of death or not, and to the statements made by the insured himself in his application for the weekly indemnity. The jury were told by the presiding judge, in instructions not otherwise excepted to, and which they could not have failed to understand, that they could not find for the plaintiff, or answer the question in the affirmative unless they were satisfied that the accident was the sole cause of death. The question, whether

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it was the sole cause of death, was one eminently for them, and they have found, as there was evidence to warrant them in doing, in favor of the plaintiff, and we do not see how their finding can be disturbed.

In regard to the other question there was evidence tending to show that a check duly addressed to the insured and with a return imprint upon the envelope in which it was enclosed and prepaid was mailed to the insured by the treasurer of the defendant association a few days before the death of the insured and that it never had been returned to the defendant. It was admitted by the defendant that the check never had been used by the insured, and the widow testified that she had never seen it, and that after the death of the insured she examined his clothes and pocketbook and looked through his effects and found no check of the defendant. In this state of the evidence it was competent for the jury to find that the check never had been received by the insured and consequently that the weekly indemnity to which he made claim had never been paid to him. On this branch of the case also, the judge gave full instructions which we think correctly stated the law. None of the instructions requested by the defendant on this or the other branch of the case could have been properly given in the form in which they were presented. We discover no error in the manner in which the presiding judge dealt with the case.

Exceptions overruled.

ALBERT DODGE & others *vs.* INHABITANTS OF ROCKPORT.

Essex. May 18, 1908. — June 15, 1908.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Great Pond. Watercourse. Tide Mill. Damages. Interest.

Although the Legislature have the power to take the waters of a great pond for a public purpose without making any compensation to owners on streams flowing from it, yet, in granting a right to use the waters of the pond for a public purpose, such as the water supply of a town, they may, if they please, require

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compensation to be made to private persons where no legal right has been interfered with.

A brook which is an outlet of a great pond, through which water of the pond has flowed to the sea for more than two hundred years with the acquiescence of all persons, has acquired the character of a natural watercourse, although the outlet connecting the brook with the great pond originally may have been an artificial channel.

The owner of a tide mill and mill dam making use of the waters of a natural watercourse, or of a stream which has acquired the character of a natural watercourse, has as much right to use the water in the way that he does as the owner of an ordinary mill has to use the water of a flowing stream in the usual way, and the fact that his dam is below high water mark and that his mill accordingly is operated as a tide mill affects the manner of his use of the water but not his right to use it.

Section 4 of St. 1894, c. 78, an act to supply the town of Rockport with water, provides that "Said town shall pay all damages sustained by any person or corporation in property by the taking of any land, right of way, water source, water right or easement, or by any other thing done by said town under the authority of this act." The town under the provisions of the act took the waters of Cape Pond, a great pond. The owner of a tide mill and mill dam on Mill River filed a petition for damages under the act. It appeared that a brook called Alewife Brook, one branch of which comes from Cape Pond, flows into Mill River above the petitioner's dam, that the water of Alewife Brook thus flowed into the pond created by the petitioner's dam, raising its level to a higher point and for a longer time than otherwise would be the case, and that this flow was diminished seriously by the taking of the waters of Cape Pond by the respondent. There was evidence that the present outlet of Cape Pond into Alewife Brook was the original and natural one, but there was other evidence that this outlet originally was merely an artificial channel dug before the year 1700, although it was not disputed that the waters had flowed in their present channel for more than two hundred years. The presiding judge refused to instruct the jury that if they found that the brook connecting Cape Pond with Alewife Brook was not a natural watercourse but an artificial channel the petition could not be maintained, and submitted to the jury the question whether the brook would in the course of nature flow at low tide across the flats upon which the petitioner's dam was constructed if no dam were there. *Held*, that the refusal of the instruction requested and the submission to the jury were correct; that as the brook had flowed in its present course for more than two hundred years and all persons had acquiesced in that condition it had acquired the character of a natural watercourse and it was immaterial whether the outlet from Cape Pond originally was natural or artificial; that the rights of the petitioner were as great as those of an ordinary riparian owner; that the fact that his dam was below high water mark and that his mill accordingly was operated as a tide mill, affected only the manner in which he made use of the water and not his right to use it; and that the damages caused by the diminution of the flow of water into the petitioner's mill pond could be found to be the direct and proximate result of the taking and not too remote to be recovered.

Upon a petition for damages for the taking of waters under St. 1894, c. 78, an act to supply the town of Rockport with water, § 4 of which provides that "no application for the assessment of damages shall be made for the taking of any water, water right, or any injury thereto, until the water is actually withdrawn or diverted by said town under the authority of this act," interest must be com-

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puted upon the amount of damage, if any, from the time when the waters actually were diverted, and a delay in the trial of the case after the filing of the petition, when either party could have brought it up for trial, is no reason for computing the interest from any later date.

SHELDON, J. The petitioner Albert Dodge, is the owner of a tide mill and mill dam on Mill River; and a brook called by various names, among which are Alewife Brook and Cape Pond Brook, flows into Mill River above his dam. One branch of Alewife Brook comes from a great pond called Cape Pond. The defendant town has taken the waters of Cape Pond under the provisions of St. 1894, c. 78. The jury have found that the petitioner has sustained a considerable amount of damage by this taking; and the question is raised whether he is entitled to recover therefor.*

It is provided by § 4 of the statute before us that the town "shall pay all damages sustained by any person or corporation in property by the taking of any land, right of way, water, water source, water right or easement, or by any other thing done by said town under the authority of this act." If the petitioner were a riparian owner upon a natural stream flowing from Cape Pond, he clearly would be entitled to recover the damages which he has sustained. *Rockport* v. *Webster*, 174 Mass. 385, 392. *Proprietors of Mills* v. *Randolph*, 157 Mass. 345. *Howe* v. *Weymouth*, 148 Mass. 605. *Cowdrey* v. *Woburn*, 136 Mass. 409. *Watuppa Reservoir Co.* v. *Fall River*, 134 Mass. 267. The Legislature might have permitted the respondent to take the waters of Cape Pond without making any compensation to owners on streams flowing therefrom. *Watuppa Reservoir Co.* v. *Fall River*, 147 Mass. 548. But it is also true, as was said by Hammond, J., in *Rockport* v. *Webster*, 174 Mass. 385, 392, that "in making any public grant the State may impose such terms as it sees fit. It may relieve the grantee from the payment of any damages for the taking of public property, or it may require compensation to be made to private persons where no legal right has been interfered with." Here the provision for the recovery of damages is of the same broad character that was before the court in *Sheldon* v. *Boston & Albany Railroad*, 172 Mass. 180, and *Hyde* v. *Fall River*, 189 Mass. 439.

* The case was reported to this court by *Schofield*, J.

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But although there was evidence that the present outlet of Cape Pond into Alewife Brook was the original and natural one, there was also evidence that this was merely an artificial channel, dug before the year 1700, though it was not disputed that the waters of Cape Pond have flowed in their present channel through the present outlet for some two hundred years. The respondent asked the judge at the trial to instruct the jury that if they found that the brook connecting Cape Pond with Alewife Brook was not a natural watercourse but an artificial channel, then the petitioner could not maintain his petition. The judge refused the request, and submitted to the jury the question whether the brook would in the course of nature flow at low tide across the flats upon which the petitioner's dam is located, as a watercourse, if there were no dam there. The jury answered this question in the affirmative, and found that the petitioner had sustained damage in his mill property and privilege from the respondent's taking to the amount of $600.

The ruling of the judge that upon these facts the petitioner's rights were analogous to those of a riparian proprietor was sufficiently favorable to the respondent. It was immaterial, under the circumstances proved, whether the outlet from Cape Pond was originally natural or artificial. It had flowed in that course for more than two hundred years, and all persons had acquiesced in that condition. *Stimson* v. *Brookline*, 197 Mass. 568, and cases there cited.

And the petitioner's rights were at least analogous to those of a riparian owner. The water of the brook flowed into the pond created by his dam, and raised its level to a higher point and for a longer time than otherwise would be the case, His use of the water of the brook was similar to that of an ordinary mill owner on a flowing stream. The fact that his dam was below high water mark and that his mill was accordingly operated as a tide mill, affected the manner of his use of the water, rather than his right to use it. In *Moulton* v. *Newburyport Water Co.* 137 Mass. 163, it was assumed that riparian owners on a tidal stream between high and low water mark have a right to the continued existence, flow and use of the stream; and it was so decided in *Lyon* v. *Fishmongers' Co.* 1 App. Cas. 662, reversing the decision of the same case reported in L. R. 10 Ch. 679, which was some-

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what relied upon in the dissenting opinion in *Watuppa Reservoir Co.* v. *Fall River*, 147 Mass. 548, 565.

Nor can it be said that the petitioner's damages, as found by the jury, are not the direct and proximate result of the taking, but are too remote or merely sentimental, as in *Fay* v. *Salem & Danvers Aqueduct*, 111 Mass. 27. There is nothing in that decision which bears on the rights of a riparian owner to use the waters of a stream flowing from a great pond. See the comments on that case in *Watuppa Reservoir Co.* v. *Fall River*, 147 Mass. 548, 565. *Cole* v. *Eastham*, 133 Mass. 65, turned upon the right of the Legislature to control absolutely the waters of great ponds; and we need not consider whether the doctrine was carried too far in that case.

The amount of the petitioner's damages was wholly for the jury, and we cannot revise their finding.

The evidence offered upon the question of interest was immaterial; and the judge rightly ruled that interest must be computed, upon the amount of damage, if any, from December 30, 1894, the time when the waters were actually diverted. *Raymond* v. *Commonwealth*, 192 Mass. 486, 489. *Hay* v. *Commonwealth*, 183 Mass. 294. *Pegler* v. *Hyde Park*, 176 Mass. 101. *Cowdrey* v. *Woburn*, 136 Mass. 409. The respondent might itself have brought the case up for trial. *Drury* v. *Midland Railroad*, 127 Mass. 571, 585. The delay in that case was much longer than in the case at bar; and it is not important to determine whether the delay in the present case was at the request of the one party or the other.

Judgment on the verdict.

The case was submitted on briefs.

H. T. Lummus & C. N. Barney, for the petitioners.

F. H. Tarr, for the respondent.

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SELECTMEN OF CLINTON *vs.* WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

Worcester. December 4, 1907. — June 16, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND LORING, BRALEY SHELDON, & RUGG, JJ.

Evidence, Judicial notice, Admissions and confessions. *Street Railway. Corporation. Statute. Estoppel. Municipal Corporations*, Officers and agents. *Words*, "Schools," "Pupils."

This court takes judicial notice of the facts that a corporation, which was organized since 1864, and which owns and operates a street railway in this Commonwealth, must have been organized under the laws of this Commonwealth, and that its organization was not under a special charter.

A street railway corporation was not organized under Pub. Sts. c. 113, §§ 2–8, until, under § 7, the locations for its tracks had been procured from the aldermen of the cities and the selectmen of the towns through which the railway was to pass, "under such restrictions as they" deemed "the interests of the public" might "require."

A street railway company, which petitioned for, was granted and accepted from the selectmen of a town under Pub. Sts. c. 113, § 7, a location for its tracks subject to certain restrictions which at that time were lawful, and thereupon under § 8 became established as a corporation, having consented to come into being subject to such restrictions, cannot be heard to complain of them.

It was within the powers of the selectmen of Clinton, on petition under Pub. Sts. c. 113, § 7, by those intending to organize the Worcester and Clinton Street Railway Company in 1877, for a grant of location for the company's tracks, to impose, as a restriction under which the grant should be made, a provision that the company should "provide to pupils in attendance upon the public schools, the State Normal School of Worcester, or any school in Worcester, transportation to such pupils at half price while going to and from school." The franchise of the corporation, which came into being under § 8 after acceptance of the location as granted and before September 30, 1898, was subject to the restriction; and such acceptance of the location and subsequent creation of the corporation must be taken to be an admission by the corporation that the restrictions imposed by the selectmen were reasonable and for the public interest.

On petition of those intending to organize the Worcester and Clinton Street Railway Company, the selectmen of Clinton in 1897, under Pub. Sts. c. 113, § 7, granted a location for the company's tracks, subject to a restriction which was in the following language: "Said company further agrees to provide to pupils in attendance upon the public schools, the State Normal School of Worcester or any school in Worcester, transportation to such pupils at half price while going to and from school." The grant was accepted and the corporation established under § 8 before September 30, 1898. In accordance with St. 1897, c. 269, § 1, that company thereafter by deed sold all its property and franchises to the Leominster and Clinton Street Railway Company, and the latter to the Worcester Consolidated Street Railway Company, the grantee in each

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deed agreeing to assume and perform all obligations and contracts of the grantor. In 1906, the Worcester Consolidated Street Railway Company refused longer to carry upon its cars at a half fare rate students attending the State Normal School, Holy Cross College, and the Worcester Business Institute. Both of the latter institutions were supported by private funds, the former of the two being an institution for higher education, and the latter an institution for the teaching of such subjects as bookkeeping, shorthand, typewriting, commercial law, business and business methods. The selectmen of Clinton by a bill in equity sought a mandatory injunction commanding the company to transport students attending the three institutions from Clintpn to the institutions and return at a half fare rate. *Held*, that, as to pupils at the State Normal School at Worcester, the restriction was enforceable against the defendant, and accordingly the mandatory injunction sought with regard to such pupils should issue; but that no injunction should issue as to the transportation of students attending the other two institutions, since they did not come within the description, "pupils . . . in attendance upon any school in Worcester."

BILL IN EQUITY, filed in the Superior Court for the county of Worcester November 7, 1906, for a mandatory injunction commanding the defendant "to provide to pupils in attendance upon the Worcester Normal School, Holy Cross College, Worcester Business Institute or any school in Worcester transportation from Clinton to said schools in Worcester and return at one-half the regular fare, while going to and from school."

Following paragraphs alleging the facts stated in the first paragraph of the opinion, the bill alleged that the defendant's predecessors in title, and the defendant until July, 1906, had provided "to pupils in attendance upon the public schools, the State Normal School in Worcester, Worcester Business Institute, Becker's Business College and Holy Cross College, transportation from Clinton to said schools in Worcester and return at one-half the regular fare while going to and from school." The ninth paragraph, referred to in the next to the last paragraph of the opinion, was as follows: "9. That said [defendant] since July, 1906, has refused and still refuses to furnish transportation at one-half prices to pupils from Clinton attending schools in Worcester, to wit, Worcester Normal School, Holy Cross College and the Worcester Business Institute, but compels said pupils to pay full fare from Clinton to said schools in Worcester and return, over the location originally granted to said Worcester and Clinton Street Railway Company."

In its answer, the defendant contended that the provision contained in the grant of location by the plaintiff's predecessors to

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its predecessor, quoted in the first paragraph of the opinion, was illegal and void and of no effect to bind either the defendant or its predecessors. The answer also alleged that in the deed from its immediate predecessor, the Leominster and Clinton Street Railway Company, there was inserted at the request of the board of aldermen of the city of Worcester, the following provision:

"It is further agreed between the grantor and grantee, in part consideration for this conveyance, that the grantee or Consolidated Company shall transport in its cars in any city or town during the hour immediately preceding the beginning and the hour immediately following the ending of a session of any public school in such city or town (or during such other periods as the board of railroad commissioners may in accordance with law prescribe), any pupil in the public schools whether residing in such or some other city or town and attending such public schools who surrenders a good and valid ticket for which such pupil or some person in his or her behalf has paid to the company one-half the amount of the regular cash fare established for the time being by said company as the fare between the point at which such pupil takes or leaves a car of the company and the public schoolhouse at which such pupil attends school." This provision, the answer alleged, the defendant never had refused to comply with.

There was a hearing before *Gaskill*, J., upon the pleadings and agreed facts. Among the agreed facts, besides those stated in the opinion, were the following:

The provision quoted above appeared in the deed from the Leominster and Clinton Street Railway Company to the defendant, and the defendant "has never refused to comply" with it "unless Holy Cross College, Worcester Business Institute and other educational institutions of a similar character supported by private means, in the territory in which the [defendant] operates, are 'public schools,' and said [defendant] now carries all pupils residing in the town of Clinton attending the public schools of the city of Worcester to and from the schoolhouses in which they attend school and their homes at a fare not exceeding one-half the regular fare charged by it for the transportation of other passengers between said points (unless Holy Cross College, Worcester Business Institute and other educational institutions

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of a similar character and supported by private means, situated in the city of Worcester, are public schools)."

The deed from the Worcester and Clinton Street Railway Company to the Leominster and Clinton Street Railway Company, and that from the latter to the defendant, each contained an agreement on the part of the grantee to assume and "perform . . . all leases, contracts, liabilities, obligations and duties of [the grantor] and each and every one of them."

Holy Cross College is an institution for higher education, supported entirely from students' fees, the branches there taught (in the college proper) including among others the following: psychology, natural theology, ethics, cosmology, general metaphysics, criteriology, dialectics, political economy, Latin, Greek, comparative study of dramatic composition, theory of rhetoric, various plays of Shakespeare, history of philosophy, higher mathematics, astronomy, physiological psychology, qualitative analytical chemistry, modern languages, Christian doctrine; and only those professing the Roman Catholic faith apply for admission to said college or become students thereof. The college also maintains a preparatory department, the subjects taught therein including, among others, Latin, Greek, algebra, geometry, Greek and Roman history.

The Worcester Business Institute teaches such special subjects as are calculated to enable its pupils to earn their living in various business occupations, the subjects there taught including among others the following: bookkeeping, shorthand, typewriting, commercial law, business and business office practice. It is supported wholly by private means.

Other facts are stated in the opinion.

The presiding judge reserved the case for consideration by this court.

The case was argued at the bar in December, 1907, before *Knowlton*, C. J., *Morton*, *Hammond*, *Braley*, & *Rugg*, JJ., and afterwards was submitted on briefs to all the justices.

G. E. O'Toole, for the petitioners.

B. W. Warren, (*C. R. Lamson* with him,) for the respondent.

SHELDON, J. This is a bill in equity brought by the selectmen of the town of Clinton to compel the defendant to carry pupils in the Worcester Normal School, in Holy Cross College,

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in the Worcester Business Institute, and in other schools in the city of Worcester, between Clinton and these schools, at one half of the regular fare charged to other passengers. The defendant has succeeded to the property, franchises, liabilities and obligations of the Worcester and Clinton Street Railway Company, through a conveyance from that corporation to the Leominster and Clinton Street Railway Company, and another conveyance from the last named corporation to the defendant. In the grant of location from the selectmen of Clinton to the Worcester and Clinton Street Railway Company, which was accepted by that company on November 9, 1897, is this provision: "Said company further agrees to provide to pupils in attendance upon the public schools, the State Normal School of Worcester, or any school in Worcester, transportation to such pupils at half price while going to and from school."

The main question in this case is as to the validity of this restriction. The defendant contends that its requirement is invalid and unconstitutional, that it creates an arbitrary and unreasonable discrimination between different classes of the travelling public, in violation of articles 6 and 7 of the Declaration of Rights in our State Constitution; and that it violates the provisions of the fourteenth amendment to the Constitution of the United States in that its effect is to deny to the defendant the equal protection of the laws and to deprive it of its property without due process of law and without just compensation. *Lake Shore & Michigan Southern Railway* v. *Smith*, 173 U. S. 684. But it must first be considered whether the defendant is entitled to raise this question.

It does not expressly appear upon the record when or how the Worcester and Clinton Street Railway Company was organized, but as was stated in *American Steel & Wire Co.* v. *Bearse*, 194 Mass. 596, 600, we have judicial knowledge that it must have been organized under the laws of this Commonwealth, and that its organization was not under a special charter. Having regard to its name and to the fact averred in the bill and admitted in the answer that its location in Clinton was accepted in November, 1897, it is almost a necessary inference that its organization was effected at about that time. But we are not left to inference; for the agreed statement of facts refers to the annual

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reports of the board of railroad commissioners. That report, of January, 1899, for the year ending September 30, 1898, shows that this corporation was organized during that year, under the general law.

The general law then in force as to such organizations was contained in Pub. Sts. c. 113, §§ 2, *et seq.* The repeal of § 7 and the amendment of § 8 of this chapter in 1898 did not take effect until October 1, 1898, and we need not consider the new provisions which then became in force. St. 1898, c. 578, §§ 26, 27, 28. See also R. L. c. 112, §§ 2, *et seq.*; St. 1906, c. 463, Part III. §§ 3, *et seq.* Under these sections of Pub. Sts. c. 113, the first thing to be done in the formation of a street railway company was the signing by fifteen or more persons of written articles of association with the intention of forming a corporation as therein provided. The directors named in these articles might then petition the board of aldermen or the selectmen for a location of the tracks of the proposed railway in each of the cities or towns through which the road was to run, and those officers might either refuse such location or grant the same or any portion thereof under such restrictions as they deemed that the interests of the public might require. It was only after such locations under such restrictions, if any, had been granted and accepted within thirty days by the directors named in the articles of association for the projected corporation that the corporation could be established or the first meeting be called. Pub. Sts. c. 113, §§ 7, 8. The section last cited says in terms, "When the track or tracks of the proposed company have been so located, the corporation may be established, and the first meeting shall be called." Manifestly the certificate of incorporation under Pub. Sts. c. 112, § 44, and c. 113, § 8, could not be issued until all these provisions had been complied with, and the fact of such compliance shown to the proper public officers. And it is equally plain that the effect of these provisions was that the granting and acceptance of the locations under such lawful restrictions as might have been imposed by the public officers who had the power to grant the locations and to impose the restrictions were made conditions precedent to the grant of the franchise to be a corporation. They were made the conditions upon which the corporation came into existence and accepted its franchise. If these restrictions

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were originally lawful, and if they have not been withdrawn or affected by subsequent modification thereof, the corporation cannot, while it continues to exercise its franchises, complain of their enforcement. It is as if the corporation had been created by a special charter containing the same restrictions. The corporation can raise no question of the constitutionality of a proceeding in accordance with the charter which it was content to accept. Holmes, J., in *Rockport Water Co.* v. *Rockport*, 161 Mass. 279. It has come into being, and has consented to come into being, subject to these restrictions, and cannot be heard to complain of them. *Interstate Consolidated Railway* v. *Massachusetts*, 207 U. S. 79, 84, and cases there cited.

But in what has thus far been said we have been dealing only with lawful restrictions. If in the granting of a location to a projected corporation the public officers who made the grant had sought to impose restrictions which were simply unlawful, either because they required the performance of a forbidden act or because they wholly transcended the scope of the authority of the officers to impose, doubtless such restrictions could not be enforced; and the question how far the grant of the location would be deemed to be valid in such a case is not before us. The general doctrine is that the location would be held to be valid, the attempt to impose an unlawful restriction being a mere nullity. *Keefe* v. *Lexington & Boston Street Railway*, 185 Mass. 183, 185. *Worcester* v. *Worcester Consolidated Street Railway*, 192 Mass. 106. *Fisher* v. *McGirr*, 1 Gray, 1. We do not doubt that the restrictions sought to be enforced in any particular case must be within the general jurisdiction of the municipal officers. But under the legislation in force when these restrictions were imposed the selectmen had the power to deal with the subject of the fares to be charged, by imposing such restrictions thereon as they deemed reasonable and for the public interest; and the acceptance of the location subject to such restrictions by the directors of the proposed corporation and the subsequent creation of the corporation upon such acceptance must be taken to be an admission by the corporation that the restrictions are reasonable and for the public interest, and in popular language might be called, as in reality it would be, a consent or agreement on its part to be bound by them. And this is the doctrine

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of our statutes. In Pub. Sts. c. 113, § 45, after provisions in the two preceding sections for regulation of the rates of fare to be charged by street railway companies, it was enacted that nothing contained in those sections "shall be held to authorize a company or said board [of railroad commissioners] to raise the rate of fare or the price of tickets above the rate or price established for a locality by agreement made as a condition of location or otherwise between a company or its directors and the mayor and aldermen of a city or the selectmen of a town, except by a mutual arrangement with such mayor and aldermen or selectmen." This is a legislative recognition of the right of the local boards to deal under § 7 with the subject matter of fares. And see Sts. 1864, c. 229, § 25; 1871, c. 381, § 35; 1874, c. 29, § 6. So this court, speaking through the Chief Justice, said that this statute recognized the validity of such agreements, though it was decided that after the enactment of St. 1898, c. 578, § 13, the municipal officers, in granting locations to a street railway company, could not impose a condition regulating and restricting the fares to be charged. But we have already seen that this later statute does not affect the question before us. And the confirmation of prior locations in the last sentence of St. 1898, c. 578, § 13, indicates at least that the validity of such restrictions as are now before us was not intended to be impaired. *Mayor of Worcester* v. *Worcester Consolidated Street Railway*, 192 Mass. 106.

It is doubtless true that the municipal officers, in granting locations and in imposing such restrictions as they deem to be required by the interests of the public, act as public officers exercising a *quasi* judicial authority, and not as agents of the city or town driving a bargain with the promoters of a projected railway. *Hewett* v. *Canton*, 182 Mass. 220, and cases there cited. *Flood* v. *Leahy*, 183 Mass. 232. Nevertheless, the terms of the locations when accepted by the company impose, as we have already seen, a liability which becomes by virtue of such acceptance something like a contractual liability; and the Legislature has often spoken of such terms, conditions and restrictions in the grant of locations as contracts, agreements, or stipulations. See besides Pub. Sts. c. 113, § 45, already referred to; Sts. 1864, c. 229, § 45; 1866, c. 286, § 2; c. 294; 1871, c. 381, § 35; 1887,

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c. 284, § 5. And the very language by which the restriction now before us was imposed is that of an agreement by the company. In view of the fact that we have found no legislative authority for agreements between the officers of cities or towns and projected street railway companies as to rates of fare to be charged other than was contained in Pub. Sts. c. 113, § 7, and the prior statutes embodied therein, (for § 45 is merely a recognition of an authority already existing,) we feel compelled to the conclusion that in each of these statutes the words "contract," "agreement," "stipulations," and the like, were used in the same sense as in St. 1871, c. 381, § 85, where the words are "by agreement made as a condition of location or otherwise." At least, it is certain that the word "agreement" is used in the statute last cited to include conditions imposed in grants of location; and that is all which need here be maintained. We are of opinion accordingly that the establishment of rates of fare was a subject as to which the selectmen of Clinton, in granting a location, might impose restrictions which would not be unlawful in themselves, and that the street railway company, organized upon the basis of such location and restrictions and its acceptance thereof, could not afterwards be heard to dispute the reasonableness of such restrictions.

Nor is it necessary for us to examine closely into the meaning of the word "locality" as used in Pub. Sts. c. 113, § 45. It is undoubtedly a word of somewhat limited signification. But it has purely a relative meaning. A sufficiently broad sense has been given to it elsewhere to cover the case before us. *State* v. *Fremont, Elk Horn & Missouri Valley Railroad*, 22 Neb. 313, 329, in which the word "locality" in a statute forbidding unjust and unreasonable charges by a railroad company was held to include any "village, city, county, or portion of the State." So the words "local freight" may refer either to shipments from one way station to another, or to freight to be carried wholly within the boundaries of a particular State. *Mobile & Montgomery Railroad* v. *Steiner*, 61 Ala. 559. *Shipper* v. *Pennsylvania Railroad*, 47 Penn. St. 338, 344. We see no reason for limiting the word to any particular city or town, especially since, in the several statutes upon street railways already referred to, the Legislature has used the words "city" or "town" when speaking of the terri-

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tory comprised in any one municipal organization. There are cases in which adjacent villages, though situated in different towns or cities, yet have their principal communications and their chief interests in common with each other, so that all their inhabitants would regard both villages as lying in the same district, locality or neighborhood. In this case, we have already seen that the general subject of regulation of fares in a projected street railway might be included in the restrictions to be imposed by the selectmen of a town in granting a location.

But all these matters were and are under the general control of the Legislature, which has full power over the uses to be made of all highways, even though it generally has chosen to exercise this control through town or city officials. *Cheney* v. *Barker*, 198 Mass. 356. *Springfield* v. *Springfield Street Railway*, 182 Mass. 41. *Worcester* v. *Worcester Consolidated Street Railway*, 182 Mass. 49. *Prince* v. *Crocker*, 166 Mass. 347, 359, and cases there cited. In view of these considerations, we are of opinion that the Legislature intended, by the provisions of Pub. Sts. c. 113, §§ 43–45, to give to the board of railroad commissioners power to revise and regulate the fares charged by street railway companies, whether or not fixed in accordance with restrictions imposed by town or city officials, subject to the condition that fares so established "for a locality" should not be raised except by a mutual arrangement with such officials. As no attempt was made to have the rates of fare fixed by the restrictions here in question for pupils of schools revised by the railroad commissioners, we need not determine whether these rates of fare could be said to have been established "for a locality" within the meaning of the statute. These considerations are not affected by the repeal on October 1, 1898, of Pub. Sts. c. 113, §§ 44, 45, and the enactment of St. 1898, c. 578, § 23, itself repealed by St. 1901, c. 180. One effect of the repeal has been to remove from the statutes the reference to fares "for a locality." Nor are they affected by the fact that power to regulate fares is not now vested in the board of railroad commissioners. St. 1906, c. 463, Part III. § 100.

We know of no legislation which has annulled or affected this restriction. As we have already seen, it was confirmed by St. 1898, c. 578, § 13. It was not affected by anything contained

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in St. 1887, c. 284, which created the defendant corporation. The burden of complying with it was assumed by the Leominster and Clinton Street Railway Company when it purchased the property and franchises of the Worcester and Clinton Street Railway Company; and by the defendant when it purchased the property and franchises of the Leominster and Clinton Street Railway Company. And nothing in St. 1897, c. 269, (see now St. 1906, c. 463, Part III. §§ 52, *et seq.*,) or in St. 1906, c. 463, Part III. §§ 98, 99, *et seq.*, or in St. 1906, c. 479, or in any other statute, relieves the defendant from the burden which it thus assumed. Certainly nothing in St. 1900, c. 125, can have any such effect.

And it may be added that we do not understand it to be contended that this restriction created any undue burden upon the street railway company when it was first imposed. Neither the defendant's answer nor the agreed facts go further than to state that the charge of half rates yields at present less than the cost of carriage, by reason of the increase in the last six years of the cost of maintaining and operating the defendant's railway. But we can pass only upon the validity of the restriction as originally imposed and assented to by the defendant's predecessor in title and voluntarily assumed by the defendant.

There is nothing in our previous decisions at variance with the conclusion which we have reached. *Keefe* v. *Lexington & Boston Street Railway*, 185 Mass. 183, as we have already seen, and *Selectmen of Wellesley* v. *Boston & Worcester Street Railway*, 188 Mass. 250, turned upon the provisions of St. 1898, c. 578, which materially altered the prior statutes. *Springfield* v. *Springfield Street Railway*, 182 Mass. 41, and *Worcester* v. *Worcester Consolidated Street Railway*, 182 Mass. 49, dealt with extensions of locations granted to already existing corporations, and not, as here, to original locations granted to directors of a corporation in process of formation and subsequently becoming the very basis of the company's corporate existence. This distinction is pointed out in *Hyde Park* v. *Old Colony Street Railway*, 188 Mass. 180. See also *Newcomb* v. *Norfolk Western Street Railway*, 179 Mass. 449, and *Selectmen of Gardner* v. *Templeton Street Railway*, 184 Mass. 294. We have found no case in which restrictions upon an original location granted before

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the taking effect of St. 1898, c. 578, and within the general power of the public officials granting them, have been held to be invalid.

Accordingly the majority of the court are of opinion that the question of fares to be charged upon the projected railway was one with which the selectmen might deal in granting a location; that the restriction imposed was within their general power to make; and that, having been accepted by the defendant's predecessor as one of the conditions upon which it came into existence and acquired its corporate franchises, and having been assumed by the defendant, it is a valid restriction and may be enforced against the defendant. The remarks of Peckham, J., in *Detroit* v. *Detroit Citizens' Street Railway*, 184 U. S. 368, 384, 385, are no less forcible against an attempt by the defendant to evade or annul this obligation than against any attempt that the plaintiffs might have made to render the obligation more onerous.

It remains to determine the extent of the obligation thus imposed, and especially whether it applies to students attending Holy Cross College and the Worcester Business Institute. The defendant is required by its terms "to provide to pupils in attendance upon the public schools, the State Normal School of Worcester, or any school in Worcester, transportation . . . at half prices while going to and from school."

The word "schools" is undoubtedly one of broad signification, and sometimes it may appear, by the connection in which it is used, to include higher institutions of learning. *Commonwealth* v. *Porter*, 1 Gray, 476, 477. *University* v. *People*, 99 U. S. 309, 324. *American Asylum* v. *Phœnix Bank*, 4 Conn. 172. *In re Sanders*, 53 Kans. 191, 197, 198. *Omaha Medical College* v. *Rush*, 22 Neb. 449. But ordinarily and without something to indicate that a wider meaning was intended to be given to this word, it will not be taken to include such higher institutions of learning as colleges or universities, or institutions for the teaching of trades, professions or business. *Commonwealth* v. *Connecticut Valley Street Railway*, 196 Mass. 306. *Chegaray* v. *Mayor of New York*, 18 N. Y. 220. *Lichtentag* v. *Tax Collector*, 46 La. Ann. (Part I.) 572. The same distinction is observed in our Constitution, c. 5, § 1, arts. 1, 2, and in our legislation. R. L. c. 89, *et seq.* Accordingly it was held in

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Commonwealth v. *Connecticut Valley Street Railway*, *ubi supra*, that a commercial college in Northampton was neither a public nor a private school within the meaning of St. 1906, c. 479. That institution upon the agreed facts was of substantially the same character as the Worcester Business Institute. Moreover, here, as in the case last cited, the restriction is one for the benefit of "pupils," not of students; and as there stated, "the word 'pupils,' by derivation and the definition of lexicographers, is properly applicable to children and youth. Students in colleges and professional schools are not called pupils." There is nothing inconsistent with this in *State* v. *Leighton*, 35 Maine, 195, or *State Board of Pharmacy* v. *White*, 84 Ky. 626. Neither Holy Cross College nor the Worcester Business Institute can fairly be held to come within the language of the restriction before us; and the students attending those institutions are not pupils within its correct construction.

The defendant has seemed to consider that this question is decisive of the case, and the language of the agreed statement of facts, if that were all, would bear out this contention. But the ninth paragraph of the bill avers that the defendant violates the restriction as to pupils attending the Worcester Normal School as well as the other institutions named; this is admitted in the first paragraph of the answer; and the facts agreed are expressly stated to be "in addition to the facts alleged in the bill and admitted in the answer." We do not understand, however, that any question is now made as to pupils or students attending the preparatory department of Holy Cross College.

Accordingly, a mandatory injunction should be issued requiring the defendant to provide to pupils in attendance upon the State Normal School of Worcester transportation between Clinton and said school, at one half the regular fare while going to and from school.

So ordered.

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JAMES McKEON *vs.* NEW ENGLAND RAILROAD COMPANY & another.

MAYNARD A. DAVIS *vs.* SAME.

Suffolk. March 3, 1908. — June 16, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Damages, For property taken or injured under statutory authority. *Grade Crossings*. *Pleading, Civil*, Petition for damages from abolition of grade crossing, Amendment. *Easement*. *Statute*.

One, whose property is depreciated in value through interference with light, air and prospect by retaining walls built by a railroad company upon its own land in the abolition of a grade crossing, has no remedy at common law.

A demurrer to a petition under St. 1906, c. 463, Part I. § 87, for damage resulting to the petitioner by reason of depreciation of the value of real estate of the petitioner, abutting on a railroad, through interference with light, air and prospect by a retaining wall built on its own land by a railroad company in the abolition of a grade crossing, will be sustained if the petition contains no allegation that there was a taking of land or of an easement in land, or a change or discontinuance of a private way by the company in the course of such abolition.

It seems, that, if a petition under St. 1906, c. 463, Part I. § 87, for damages resulting to land of the petitioner from the abolition of a grade crossing of a railroad with a highway contains an allegation that in the course of such abolition some land or an easement in land was taken, or that a private way was changed or discontinued, whereby the petitioner suffered special and peculiar damage, it is not necessary to allege that land or an easement in land of the petitioner was taken, or that a private way of his was changed or discontinued.

Interference with light, air and prospect by a railroad company in the abolition of a grade crossing of the railroad with a public way does not constitute such a taking of an easement in the land so interfered with as, without more, will support a petition for damages under St. 1906, c. 463, Part I. § 87.

Damage, resulting to the owner of land from the erection of temporary bridges over it by a railroad company and from the running of trains thereon during the work of abolishing a grade crossing, cannot be recovered by petition under St. 1906, c. 463, Part I. § 87. The owner's remedy, if any, is in tort.

TWO PETITIONS, filed in the Superior Court for the county of Suffolk on July 18, 1907, for damages alleged to have been sustained by the petitioners by reason of the abolition of the crossing at grade of Dudley Street in Boston by the New England Railroad.

The substance of the petitions is stated in the opinion. Demurrers of the defendants were overruled by *Richardson*, J., who, at the request of the respondents, reported the cases for consideration by this court.

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A. F. Clarke, for the respondents.

S. M. Child, (*M. L. Jennings* with him,) for the petitioners.

MORTON, J. These are petitions for the assessment of damages alleged to have been caused by the abolition of the grade crossing on Dudley Street in Boston. The cases come here on report after a demurrer in each had been overruled, and the question is the same in both. They were argued together and we proceed to consider them together.

The McKeon petition, after describing the premises and after referring to the decree of the Superior Court under which the defendants have acted, alleges that the defendants "have caused and are causing great damage to the petitioner's property by the erection of retaining walls on Norfolk Avenue in front of and along the side of and in the rear of the plaintiff's property causing him great and permanent loss in the value of the same and that said defendant companies in pursuance of said order and in doing the work thereunder have caused your plaintiff great damage by the erection of the temporary bridges over said Norfolk Avenue and upon and against your plaintiff's property over which said bridges said companies have caused to be run during the prosecution of said work a great many trains daily, that the grade of the said roadbed of said railroad has been raised a great height shutting out your plaintiff's light and air and otherwise impairing the value of his property." The allegation in the Davis petition is that the defendants "have caused and are causing your plaintiff great damage to his property aforesaid by the building against his property of a high granite retaining wall, impairing your plaintiff's right to light and air and reducing the value of your plaintiff's property by a large amount."

The defendants contend that the remedy of the plaintiff McKeon, if any, for the erection of temporary bridges upon his property and running trains over the same is in tort; that neither the plaintiff McKeon nor the plaintiff Davis has any remedy at common law for any damages caused by the building by the defendants of retaining walls upon their own premises even though the result is to shut out light and air from the premises of the petitioners, and that neither has any remedy under the statute in regard to the abolition of grade crossings for the reason that in neither case does the petition allege any

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taking of land or an easement therein or discontinuance of a private way.

It does not appear in either of the petitions when the proceedings for the abolition of the crossing were instituted. But it is said in the briefs for the petitioners that the petition for the abolition of the crossing was filed under R. L. c. 111, §§ 149–160, inclusive; and this is also stated in substance in the brief of the defendants, and we assume the fact to have been as both parties seem to agree that it was.

R. L. c. 111, § 153, as amended by St. 1905, c. 408, § 3, and St. 1906, c. 463, Part I. § 37, which was the law in force at the time of the entry of the decree in the Superior Court,* provides in regard to the liability of railroad corporations as follows: "All damages which may be . . . caused by the taking of land for the railroad or by the change or discontinuance of a private way, or by the taking of an easement in land adjoining a private way or a railroad location in connection with the abolition of a grade crossing shall primarily be paid by the railroad corporation; and all damages which may be sustained by any person by the abolition of private ways, except as hereinbefore provided, shall be entirely paid by the railroad corporation. If the parties interested cannot agree upon said damages, any party may have the damages determined by a jury in the Superior Court . . . in the same manner as damages may be determined which are caused by the taking of land for the locating of railroads and the laying out or discontinuance of public ways, respectively." The original grade crossing act provided for the determination of the damages "in the same manner and under like rules of law as damages may be determined when occasioned by the taking of land for the locating and laying out of railroads and public ways, respectively." The words "and under like rules of law" were retained through all the various amendments that were made until the Revision of 1902, when, for some reason, probably because they were deemed superfluous, they were omitted from the statute. St. 1890, c. 428, § 5. St. 1891, c. 123. St. 1894, c. 216. St. 1897, c. 264. St. 1898, c. 200. St. 1900,

* The decree authorizing the abolition of the grade crossing was entered July 19, 1906.

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c. 463. Their omission does not, however, we think, affect the rules of law applicable to the cases before us. At common law the petitioners would have no remedy for any damages caused to their property through interference with light and air and prospect by the erection by the defendants of retaining walls upon their own land. *Cassidy* v. *Old Colony Railroad*, 141 Mass. 174. Their remedy, if they have any, is under the statute in relation to the abolition of grade crossings. And in order to bring themselves within the remedy afforded by that statute their petitions must contain the necessary allegations.

It is plain that, under the recent decisions of this court, the petitioners have suffered special and peculiar damages in the abolition of the crossing, (*Whitney* v. *Commonwealth*, 190 Mass. 531. *Hyde* v. *Fall River*, 189 Mass. 439. *Sheehan* v. *Fall River*, 187 Mass. 356. *Sheldon* v. *Boston & Albany Railroad*, 172 Mass. 180. *Penney* v. *Commonwealth*, 173 Mass. 507,) and that if that were all that it was necessary to allege in order to entitle them to maintain their petitions, then the demurrers were rightly overruled. But we do not think that it is. As we construe the statute, the defendants were liable only in case there was a taking of land or of an easement in land by them, or a change or discontinuance of a private way. And it is not alleged in either petition that either one of those things was done by the defendants and that damage to the premises of the petitioners was caused thereby. It is not necessary that land of the petitioners or an easement therein should have been taken. But no case has gone so far as to hold that damages like those sustained in these cases can be recovered where no land or easement in land is taken. Interference with light, air and prospect does not constitute the taking of an easement in the land so interfered with, though it may result in damage to the property interfered with, and is a proper element of damage when land is taken. It should be noted that in *Rand* v. *Boston*, 164 Mass. 354, which has since been overruled (*Hyde* v. *Fall River*, *supra*), and in which there was a dissenting opinion, land on the opposite side of the street was taken and also in *Hyde* v. *Fall River*, *supra*.

The erection of temporary bridges on and over the property of the petitioner McKeon and the running of trains over the same was a trespass, not a taking, and the remedy, if any, for

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any damages caused thereby is in tort. See *Peabody* v. *Boston & Providence Railroad*, 181 Mass. 76; *Dodge* v. *County Commissioners*, 3 Met. 380.

It is stated in the briefs for the petitioners that land was taken, although it is not so alleged in the petitions. And the petitions can, perhaps, be so amended as to obviate the objections which are now urged to their maintenance. But that is a matter for the Superior Court to consider and pass upon.

The entry will accordingly be demurrers sustained.

So ordered.

CATHERINE McGOWAN *vs.* PATRICK MONAHAN.

Suffolk. March 9, 1908. — June 16, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Landlord and Tenant, Landlord's liability to tenants. *Negligence*, Of one owning or controlling real estate.

In the absence of an agreement on the part of the owner of a tenement house to keep the passageway used in common by the occupants of all the tenements lighted, the landlord's duty to each of the tenants is to keep the passageway in the condition in which it apparently was at the time of the letting of the premises to such tenant, and if, at the time of such letting, the passageway was not lighted in the early hours of the morning, such tenant cannot recover from the landlord for injuries resulting from an accident caused by his tripping at such an early hour on a mat in the passageway on account of darkness.

It is not negligence for the owner of a tenement house of four stories to place a mat in the passageway used in common by the occupants of all the tenements on the upper three stories and in front of a door which leads into a tenement which he occupies on the second floor, and not to warn the tenants of its presence, although he knows that, by the terms under which the tenements are let, the passageway is left dark during a part of the night.

TORT by a tenant in a tenement house against the landlord to recover for injuries received by the plaintiff by reason of her tripping upon a mat alleged to have been negligently placed in the common passageway by the defendant. Writ in the Superior Court for the county of Suffolk dated December 17, 1903.

There was a trial before *Gaskill*, J. The plaintiff testified that at the time of the accident she had been living in the tenement for nearly two years, that the building was arranged

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for stores on the ground floor and suites of rooms above; that the suite above the stores was occupied by the defendant and the suite above him was occupied by the plaintiff, while that above her was occupied by one Schwartz; that there was an outside door "which you enter from the street; that the first thing you come to after you enter the door is the stairs going up; that there is a long flight of stairs, then you turn and go up three or four stairs and come to a landing; that this landing is opposite the door of the defendant's suite; that there is no other suite opening out from that landing; that you continue turning to the left and going up stairs and come to the apartments at the time occupied" by the plaintiff; that "there is glass in the outside door, thick, heavy, cloudy glass"; that there was no glass through the door which led into the defendant's suite; that a lamp was lit in the hallway between four and five o'clock in the afternoon, and was left burning until ten o'clock at night; that there was no gas light or gas jet in the hallway at the time of the accident; that on the day of the accident, July 3, the plaintiff had started to go to her work between five and half past five in the morning. "I was going down stairs . . . and I came down my flight of stairs all right. I let go the banisters like this (indicating), and there is a turn, and I hit my foot, my left foot, against the corner of something. I didn't know what it was but I found out afterwards it was the mat. And I fell down. I went to reach for the banisters down and I couldn't catch hold, it was too far down, I would have to stoop, and I fell over on this hand and I broke it."

Other facts are stated in the opinion.

At the close of the plaintiff's evidence, the presiding judge directed a verdict for the defendant, and the plaintiff excepted.

W. M. Noble, for the plaintiff.

N. N. Jones, for the defendant.

LORING, J. The most that the jury were warranted in finding was that the plaintiff tripped and fell over an ordinary mat in front of the defendant's outer door as she was going down stairs in the dark hours of the morning, through the unlighted common passageway of the tenement house in question.

The plaintiff was the lessee of the tenement next above that occupied by the defendant. The defendant was the owner of

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the building and the plaintiff's landlord as well as the occupant of the tenement next below that of the plaintiff.

It should be added that it could have been found that the mat had been put in front of the defendant's door the night before, without warning having been given of its presence, and that the space between the outer side of the mat and the banisters on the edge of the landing was not a wide one. How narrow it was did not appear. Neither did it appear how the plaintiff happened to trip. All that appeared in addition was that the plaintiff was allowed to testify without objection that her daughter examined the mat immediately after the accident and said that it "was turned out of place."

We do not think that the ruling can be justified on the ground that there was no evidence that the defendant placed the mat or caused it to be placed in front of his outer door. The mat was spoken of by the plaintiff as the defendant's mat without objection on his part. The fact that it was his mat, coupled with the fact that it was in front of his outer door, warranted the finding that he put it there or caused it to be put there.

There was no evidence of an agreement on the part of the defendant to light the common passageways. In the absence of such an agreement the defendant's duty to the plaintiff consisted in keeping the common passageway in the condition it was in, or apparently in, at the date of the lease of the plaintiff's tenement to her. See in this connection *Miles* v. *Janvrin*, 196 Mass. 431; *Andrews* v. *Williamson*, 193 Mass. 92; *Miller* v. *Hancock*, [1893] 2 Q. B. 177. The plaintiff cannot complain that the passageway was dark at the time of the accident. *Jordan* v. *Sullivan*, 181 Mass. 348. *Dean* v. *Murphy*, 169 Mass. 418.

The case at bar therefore resolves itself into the question whether it is an act of negligence to put an ordinary mat before the outer door of a tenement, on a narrow landing which is part of a common passageway, where, by the terms of the contract under which the plaintiff used that common passageway, it was not to be lighted throughout the night. Placing a mat in a common passageway before the outer door of a tenement leading out of it is as matter of common experience usual and ordinary and is a thing which all using the passageway must be taken to expect, and no warning is necessary when it is first done. In

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principle the question is not unlike that decided in *Jennings* v. *Tompkins*, 180 Mass. 302. The case of *Toland* v. *Paine Furniture Co.* 179 Mass. 501, is much relied on by the plaintiff. But there the plaintiff was invited on the defendant's premises on business. In such a case the defendant was bound to make them safe by lighting them properly, and there was evidence that they were not properly lighted. Further, there was evidence in that case that the rubber mat over which the plaintiff tripped was curled up on the edge where she tripped, and nailed down on each side, making the place an unsafe one.

Exceptions overruled.

CHARLES DUNCAN *vs.* FRANK R. CORDLEY & another.

Suffolk. March 9, 1908. — June 16, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Contract, Construction, Performance and breach.

A contractor has done all that is required of him under a contract whereby for a certain sum he agreed with the owner of a tract of land "to fill" two streets thereon to a certain level and finish them ten feet wide at the top, the materials for the construction to be taken from the owner's land and the work to be completed by a certain date, when he has so filled and finished the streets in a workmanlike manner within the time set; and the fact that, thereafter, through no fault of his, the surfaces of the streets settle below the prescribed level, does not affect his right to recover the contract price for the work.

CONTRACT to recover a balance alleged to be due to the plaintiff from the defendants, trustees of the Crescent Land Company, for the construction of two streets, as stated in the opinion. Writ in the Municipal Court of the City of Boston dated December 20, 1905.

On appeal to the Superior Court, there was a trial before *Pierce*, J. The agreement between the parties was stated in the following two letters: Letter from the plaintiff to the treasurer of the Crescent Land Company: "Roxbury, June 28, 1904. Dear Sir: Confirming our conversation of to-day over the telephone I will say that I hereby agree to fill the two streets as

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shown in the plan and find the material on the ground, it being agreed that the finished streets to be ten feet wide in the top for the sum of $805. Your proposition to deposit the $805 in the National Rockland Bank is satisfactory to me." Letter from the treasurer of the Crescent Land Company to the plaintiff: "Dear Sir: I am in receipt of your letter of the twenty-eighth inst., and accept your bid of $805 to complete the two North and South Streets as shown on the plan of the Crescent Land Company's property. The two streets are to be built up to the level of Commonwealth Ave., and finished ten feet wide at the top. The material for the construction to be taken from the Company's property, and the work to be completed on or before July 20th, 1904. In accordance with our understanding I have today sent to the National Rockland Bank, a check for $805, proceeds of which are to be paid you upon completion of the contract as above."

Other facts are stated in the opinion.

At the close of the evidence, the presiding judge refused to direct a verdict for the defendants, and they excepted.

H. R. Bailey, for the defendant Rollins.

A. Berenson, for the plaintiff.

MORTON, J. This is an action upon a written contract to recover the balance alleged to be due for building two streets on land of the Crescent Land Company in Boston. The streets were to be built up to the level of Commonwealth Avenue, and when finished were to be ten feet wide at the top. The material was to be taken from the company's land and the work was to be completed on or before July 20, 1904. There was a verdict for the plaintiff, and the case is here on exceptions by the defendants to the refusal of the presiding judge to rule that on all the evidence the plaintiff was not entitled to recover. The case was submitted to the jury under the instructions not otherwise objected to.

The only question is whether the streets were completed according to the contract. The jury must have found that they were, and we do not see how it could have been ruled as matter of law that they were not. There was testimony tending to show that they were built up to the level of Commonwealth Avenue and finished ten feet at the top as required by the con-

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tract, but that afterwards, owing to the nature of the land on which it was built and perhaps to the action of the elements, one of them settled so that it was below the stipulated level. The defendant contends in effect that the plaintiff was bound to fill it up again and to keep filling it up as often as it settled until it remained permanently at the level contracted for, and that, because he did not do so, he did not perform his contract and is not entitled to recover. But all that the contract required the plaintiff to do was to build the streets to the level of Commonwealth Avenue and finish them ten feet on top, and, when he had done that, he had performed all that the contract called for. If one of the streets afterwards settled owing to the nature of the land on which it was built, or the action of the elements, the plaintiff was not responsible therefor, and was not bound to fill the street up again. If the street had settled during the process of construction, the plaintiff would have had to keep filling it in until he brought it up to the required level. But, after it was once completed, as the jury have found that it was, his obligations under his contract were ended. Cases like *Dermott* v. *Jones*, 2 Wall. 1, relied on by the defendants, and *Adams* v. *Nichols*, 19 Pick. 275 are not applicable.

Exceptions overruled.

GEORGE L. MAYBERRY, executor, *vs.* CHARLES H. SPRAGUE.

Middlesex. March 10, 1908. — June 16, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Contract, Performance and breach, Rescission. *Assignment*. *Practice, Civil*, Demurrer, Plea in abatement.

The payee of a promissory note secured by a mortgage of personal property brought an action of contract against the maker and attached by trustee process various accounts due to the maker. The maker thereupon made an assignment for the benefit of his creditors to one who, in order to release the accounts attached, personally agreed in writing with the payee of the note that the payee "does hereby sell, assign and set over" to the assignee the promissory note and the mortgage, and authorized the assignee to discontinue the action which the payee had brought against the maker, and, "in consideration thereof," the assignee personally agreed to pay the payee the amount of the note. The trustees in the action brought by the payee thereupon were discharged, and the assignee pro-

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cured from them the amounts which had been due his assignor, but, the payee not first delivering the note and mortgage to him, the assignee refused to pay the amount thereof to the payee, and an action was brought against the assignee on the contract to enforce such payment. The defendant in his answer claimed damages in recoupment because of the failure of the plaintiff to deliver the note and mortgage to him, but at the trial offered no evidence of any such damage, but admitted that he had not paid the plaintiff, and the presiding judge directed a verdict for the plaintiff. *Held*, that the verdict was directed properly, since by the terms of the agreement the title to the note and mortgage and the right to proceed under them were transferred to the defendant and therefore delivery of the note and mortgage to him was not a condition precedent to the plaintiff's right to recover on the contract, and, the defendant not being able to place the plaintiff *in statu quo*, he had no right to rescind the contract, but must perform it.

An objection that an action of contract upon an agreement in writing improperly is brought against one "as assignee of" another "for the benefit of creditors" instead of against the defendant individually, the declaration showing that the agreement was made by the defendant in his individual capacity, should be taken by plea in abatement or by demurrer, and cannot effectually be raised at a trial of the action.

CONTRACT upon the agreement in writing between the plaintiff's testator, Henry G. Houghton, and the defendant, personally, which is described in the opinion. Writ in the Superior Court for the county of Middlesex dated April 27, 1906.

The writ directed the sheriff to "attach the goods and estate which were of . . . Hapgood and . . . Long, . . . in the hands and custody of Charles H. Sprague . . . assignee for the benefit of creditors of said . . . Hapgood and . . . Long" and to summon "the said Charles H. Sprague as he is assignee as aforesaid" to appear at the next term of the court. The contract annexed to the declaration was between the plaintiff's testator and the defendant acting in a personal capacity. There was no demurrer or plea in abatement.

The defendant in his answer admitted the allegations of fact in the declaration (which are the facts stated in the opinion), but denied liability because the plaintiff's testator never had tendered or delivered the note and mortgage therein mentioned to the defendant; and also alleged that the defendant was entitled to damages in recoupment because of the failure of the plaintiff to deliver the note and mortgage.

There was a trial before *Stevens*, J., who, as stated in the opinion, directed a verdict for the plaintiff, and the defendant excepted.

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C. H. Sprague, pro se, submitted a brief.

W. V. Taylor, for the plaintiff.

MORTON, J. This is an action of contract to recover upon a written agreement entered into between the defendant and the plaintiff's testator. The presiding judge directed a verdict for the plaintiff and the case is here on the defendant's exceptions to that ruling.

The plaintiff's testator, one Houghton, had a note for $3,000, secured by a chattel mortgage. The note and mortgage were made by Everett E. Hapgood and Swift N. Long, copartners under the firm name of Hapgood and Long Company. Houghton brought suit on the note and trusteed funds of the Hapgood and Long Company in the hands of Thomas E. Turnbull, Rudolph F. Haffenreffer, and the Massachusetts Loan and Trust Company. Thereafter the Hapgood and Long Company made an assignment to the defendant for the benefit of their creditors of all their book accounts, bills and notes receivable and choses in action, together with their books of account. The assignment included accounts due from one or more of the trustees and the agreement recites and provides amongst other things that "whereas it is claimed by the said Hapgood and Long Company that the account due from said Turnbull is upwards of fourteen hundred dollars ($1400), but the same is disputed by the said Turnbull,

"Now therefore, in order to facilitate a settlement with or to expediate legal proceedings against said Turnbull, and in order to facilitate a settlement between the said Houghton and the said Hapgood and Long, It is agreed as follows, to wit:

"The said Houghton does hereby sell, assign and set over to the said Sprague, said promissory note of three thousand dollars ($3000), and the mortgage collateral thereto, and has authorized the said Sprague to discontinue said action brought by the said Houghton against said Hapgood and Long, or to prosecute the same in the name of him the said Houghton, but without expense to him, and

"In consideration thereof the said Sprague promises and agrees to pay the said Houghton from the funds that shall be collected from the said Turnbull, the sum of thirteen hundred and seventy-five dollars ($1,375); and if so much as thirteen

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hundred and seventy-five dollars ($1,375) shall not be collected from said Turnbull, then the said Sprague is to make up the difference from other funds belonging to him as assignee as aforesaid."

Upon the execution of this agreement, the trustees in the suit brought by Houghton were discharged, and the defendant received from Haffenreffer and the Massachusetts Loan and Trust Company the amounts due Hapgood and Long, and later collected from Turnbull $1,000, which, with other funds received by him under the assignment, was sufficient to pay the $1,375 called for by the agreement. Demand was made upon the defendant for payment of the same, and upon his neglecting or refusing to pay, this suit was brought. Houghton refused to deliver to the defendant the note and mortgage, and the defendant has received neither. At the trial the note and mortgage, without any indorsements or transfer thereon from Houghton or any one else, were tendered to the defendant by the plaintiff, and the defendant declined to accept them. The property covered by the mortgage has been sold and scattered by one Gifford, and cannot be found; and no substantial part of the note can be collected from the maker.

The defendant contends in effect that Houghton's refusal to deliver the note and mortgage to him constituted such a breach of the agreement as to release him from any liability thereunder. He does not offer to put the plaintiff *in statu quo* for the reason evidently that he cannot do so. If the agreement had been simply that, upon transfer and assignment to him by Houghton of the note and mortgage, the defendant should pay him $1,375 in the manner provided, and Houghton had refused to assign and transfer the note and mortgage, it is clear that the assignment and transfer of the note and mortgage or a tender of the same would have been a condition precedent, and, unless and until such assignment and transfer had been made or tendered, no action could have been maintained by Houghton or his representative upon the agreement to recover the $1,375. But that was not the agreement. By the agreement Houghton sold and assigned the note and mortgage to the defendant and agreed to give up to him control of the suit which he, Houghton, had brought and that the trustees should be discharged in order

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that the defendant might collect from them the amounts due from them to Hapgood and Long. All that has been done, and the defendant has collected of the trustees the amounts due from them to Hapgood and Long. What has become of the suit does not appear. Manifestly the defendant could not put Houghton *in statu quo*, and, as the case stood, the only remedy which he had was to recoup in damages for the refusal by Houghton to deliver the note and mortgage. *Marston* v. *Singapore Rattan Co.* 163 Mass. 296. By the agreement "Houghton does hereby sell, assign and set over to the said Sprague said promissory note of three thousand dollars ($3,000), and the mortgage collateral thereto." This operated of itself to transfer to the defendant the title to the note and mortgage. We assume in favor of the defendant that Houghton, if required to do so, was bound to perfect the title by a delivery of the note and mortgage thus conveyed, and that if the defendant sustained any damage in consequence of his refusal or neglect to do so the defendant could recoup the same in this action. But it did not appear, and the defendant did not offer to show, that he had sustained any such damage. On the contrary he stated to the court in substance that as to the note he could not show that it had any value, and that he did not care to go to the jury in regard to the matter of recoupment, so far as the note was concerned. As to the mortgage there was nothing to show that he could not have foreclosed it by proper proceedings and taken possession of the property, or that the property had been sold and scattered by Gifford in consequence of the neglect or refusal of Houghton to deliver the mortgage to the defendant, or to execute a more formal transfer of it, or that the defendant had suffered any damage in any way through Houghton's refusal to deliver the mortgage to him. There being nothing to show that the defendant had sustained any damage in consequence of the refusal of Houghton to deliver the note and mortgage to him, the court rightly directed a verdict for the plaintiff for the full amount claimed.

The objection that the action was improperly brought against the defendant as assignee should have been taken by plea in abatement or demurrer.

Exceptions overruled.

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JAMES B. STONE vs. WRIGHT WIRE COMPANY.

Suffolk. March 10, 1906. — June 16, 1906.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Contract, Construction. Net Profits. Partnership.

In an action to recover for the alleged breach of a contract in writing between the plaintiff and the defendant, a corporation, by which the defendant was to furnish the capital for establishing and conducting the business of manufacturing and selling wire rope and the plaintiff was to furnish his skill and devote all his time to the business, and the "net profits" were to be shared equally between the plaintiff and the defendant, it appeared that the defendant before the making of the contract was engaged in manufacturing wire cloth and that the new business of manufacturing and selling wire rope was to be carried on as a separate department of the defendant's business to be known as the wire rope department, that the amount of capital to be furnished by the defendant was $50,000 and no interest was to be paid on that sum. The contract provided as follows: "The said capital to be represented by proper building or buildings suitable for making rope of various kinds and qualities from wire, with power and machinery sufficient to so manufacture such rope to the amount of $100,000 (present sales price) per annum, and by the amount of capital necessary to purchase or provide the wire necessary for the production of rope to the amount named per annum, meaning that the said party of the first part [the defendant] is to provide all that is necessary for the equipment and establishment of the wire rope business to the extent above specified, together with the proper facilities for carrying on the same and the same is to be provided as soon as practicable." Another provision of the contract was as follows: "In ascertaining the net earnings the cost or expenses of the business shall be made up the same as if this department were a separate company allowing for taxes on the capital employed and other charges as usual." In computing the "net earnings" to be shared with the plaintiff under the contract in a certain year the defendant charged against the gross earnings, a sum for depreciation of buildings and machinery, another for power furnished by it to the wire rope department, another for repairs, another for insurance, and another for a loss of finished product destroyed while in a warehouse "hired maintained and managed" by the wire rope department. The plaintiff objected to each of these charges, and rested his claim for damages upon his alleged right to have them disallowed. *Held*, that each of these charges was a proper deduction in computing the "net profits" to be shared equally by the plaintiff and the defendant under the contract, and that for this purpose it did not matter whether the contract created a partnership, as, if it did not, the plaintiff was to be paid for his services in "net profits" on the same basis as if the plaintiff and the defendant had been partners; that, in computing the net profits of a business, depreciation, repairs and loss of finished product are proper charges against gross earnings; that insurance was a "usual" charge of a business within the meaning of the provision of the contract above quoted, and that, without such provision, the deduction was a proper one, if the plaintiff did not object to the buildings and machinery furnished by the defend-

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ant as capital being insured; and that the charge for "power" also was deducted properly, as the provision in the contract that the defendant should provide proper buildings "with power and machinery sufficient to so manufacture such rope" meant that the defendant should provide buildings equipped with power and not that the power should be furnished free of charge.

CONTRACT for the alleged breach of an agreement in writing, dated December 2, 1902, the material parts of which are described in the opinion. Writ dated November 16, 1907.

In the Superior Court the case was submitted upon an agreed statement of facts to *Richardson*, J., who made an order that judgment *pro forma* be entered for the defendant. Such a judgment was entered; and the plaintiff appealed.

A. H. Russell, for the plaintiff.

C. M. Thayer, for the defendant.

LORING, J. The questions presented on this appeal grow out of a contract made between the defendant corporation, as the party of the first part, and the plaintiff together with one Waites, since deceased, as the parties of the second part.

This was a contract for the establishment and conducting of the business of manufacturing and selling wire rope. The capital was to be furnished by the corporation (the party of the first part). The parties of the second part were to furnish their skill and to devote all their time to the business. The "net profits" were to be shared equally between the two.

It appears from the terms of the contract that before the making of it the defendant was a corporation engaged in manufacturing wire cloth, and the new business of manufacturing and selling wire rope was to be carried on as a separate department of the business of the corporation, to be known as the wire rope department. The amount of capital to be furnished by the corporation was fixed by the contract at $50,000, if the sales of wire rope did not exceed $100,000 a year, and no interest was to be paid on that sum. The contract contained this provision: "The said capital to be represented by proper building or buildings suitable for making rope of various kinds and qualities from wire, with power and machinery sufficient to so manufacture such rope to the amount named per annum, meaning that the said party of the first part is to provide all that is necessary for the equipment and establishment of the wire rope

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business to the extent above specified, together with the proper facilities for carrying on the same and the same is to be provided as soon as practicable."

In making up the joint account for the year ending August 31, 1907, the corporation charged against the gross earnings of the business a sum for depreciation of buildings and machinery, another for power furnished by it to the wire rope department, another for repairs, another for insurance, and a fifth for loss of finished product destroyed while in a warehouse "hired, maintained and managed" by the wire rope department. The plaintiff objected to each and all of these charges against the gross earnings, and this action was brought to test the right to make them. No question of the reasonableness of the amounts charged in the year in question is presented here. The only question now raised is the right of the defendant to make any charges against gross earnings of the character here in question.

On the right and propriety of making such charges against the gross earnings to ascertain the "net profits," there can be (in our opinion) no doubt. And it is not necessary to invoke the special provisions of the fifth article of the contract which provides that "in ascertaining the net earnings the cost or expenses of the business shall be made up the same as if this department were a separate company, allowing for taxes on the capital employed and other charges as usual."

Had all the capital been furnished in money in place of being "represented by proper building or buildings . . . with power and machinery, . . . and by the amount of capital necessary to purchase or provide the wire necessary for the production of rope to the amount named per annum," the propriety of these charges would have been plain.

So far as depreciation, repairs and loss of finished product are concerned, they are a proper charge against gross earnings, because there can be no "net profits" in a partnership until the capital is made good.

It is of no consequence here that the parties of the first and second parts were not (if they were not) technically partners. The parties of the second part were to receive for their services one half of the "net profits," and in ascertaining the net profits "taxes on the capital employed and other charges as usual"

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were to be made. If the two parties to the contract were not partners, the plaintiff and his associate were to be paid for their services in "net profits" on the same basis as would have resulted had they been partners.

The contract before us is not like an agreement to farm land on shares, as urged by the plaintiff. That is an agreement to halve the gross earnings, not the "net profits."

Insurance is a "usual charge" of a business, and so it comes within article 5. Apart from that, if the plaintiff did not object to the buildings and machinery furnished by the defendant as capital being insured, he cannot object to it as a charge to be deducted from gross earnings to get the "net profits." If the buildings or machinery had not been insured and had been burned, the whole value would have been chargeable against gross earnings.

The remaining charge is that for power. The plaintiff contends that he is charged with power twice. His contention is that by the terms of the contract power is part of the $50,000 of capital represented by proper building or buildings, with power and machinery, and the defendant is paid for the use of the power used as it is paid for the use of the buildings, and that the power is charged for by the corporation a second time in the charges now made against gross earnings. But the provision as to "power" in the contract is not a provision that power shall be furnished as well as buildings. It is a part of the description of the buildings to be furnished, namely, buildings with power and machinery sufficient to manufacture wire rope to the amount of $100,000 a year. The exact wording of the article is: "The said capital to be represented by proper building or buildings suitable for making rope of various kinds and qualities from wire, with power and machinery sufficient to so manufacture such rope to the amount of $100,000 (present sales price) per annum." The defendant is no more precluded from charging for power furnished to operate the machinery than it would be if it furnished the employees for the same purpose.

Judgment affirmed.

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SELIG LIPSKY & another *vs.* JACOB S. HELLER & another.

Suffolk. March 11, 1908. — June 16, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & RUGG, JJ.

Equity Pleading and Practice, Master's report. *Easement. Way. Light and Air.*

A party to a suit in equity who fails to file exceptions to a master's report in support of objections which he has filed is deemed to have accepted the report.

Where a master's report does not report the evidence a party to the suit who has filed exceptions to the report is none the less concluded by the master's findings of fact.

Where the plaintiff in a suit in equity informs the master to whom the case has been referred that he does not desire a finding on one of the matters included in his bill and the master accordingly leaves this question undecided, no objection on this ground is open to the plaintiff on exceptions to the master's report or on an appeal from a decree confirming it.

One owning land in a city divided it into five lots as shown on a plan, two of the lots and the rear portions of the others being accessible from a public street only by the use of passageways and an open space or court designated on the plan. He made separate deeds of four of the lots designating each by reference to the plan, which was recorded in the registry of deeds. The deeds of three of these lots granted a right of way in, along or over the court and passageways to a public street in common with others having a like easement or to whose estates such rights were granted as appurtenant, and in two of these deeds the open space was referred to as "a court" or "an open court." The open space was at the back of the fourth lot, and the deed of that lot described it as "subject to a right of way . . . in and over the passageway and open court, on the northerly and easterly sides appurtenant to the other estates designated on said plan." Later the same grantor sold and conveyed the fifth lot by deeds containing no effectual reference to the plan or the easement. *Held*, that the grantor by his deed of the fourth lot, making it subject to the right of way as described above, excepted such easement for the benefit of the fifth lot which he then owned, that being one of the "other estates designated on said plan" to which the right of way was appurtenant.

By describing land in a deed as bounding on "an open court," which belongs to the grantor, and granting a right of way "in along or over" such court and certain passageways connecting therewith, no easement of light and air over the court is created, where it does not appear that at the time of the conveyance such an easement was indispensable for the reasonable enjoyment of the land conveyed.

In a suit in equity by the respective owners of two lots of land upon a city street abutting in the rear upon an open court constituting the back portion of a lot of land belonging to the defendant fronting on the same street between the lots of the two plaintiffs, to restrain the defendant from extending his building over the open space or court in which the plaintiffs claimed rights of way and easements of light and air, it appeared that all of the lots formerly had belonged to

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the same person, who divided the land into these lots according to a plan recorded in the registry of deeds, that in the deeds the lots of the plaintiffs were bounded upon the open space described as "a court" or an "open court," that the land of the defendant was made "subject to a right of way . . . in and over the passageway and open court, on the northerly and easterly sides appurtenant to the other estates designated on said plan," that the court was connected with a public street by a passageway under the defendant's building, and that another passageway led from the other end of the court along the rear of the lot of one of the plaintiffs. There were no words in the deeds creating an easement of light and air and it did not appear that at the time of the conveyances to the plaintiffs such an easement was indispensable for the reasonable enjoyment of the land conveyed, and it was held that no such easement was created. A master to whom the case was referred found, that the use of the whole surface of the court for passage had been general and unopposed, and that such surface had been repaired at the expense of the lot owners, that no definite assignment of the location and width of the way in the court had been established by user, and that the plaintiffs were entitled to a convenient way, which he located along the northerly and easterly sides of the court, making its width the same as that of the covered passageway under the defendant's building through which access to the street was obtained. He found that if the way was so arched or built over as to correspond in height with the existing covered passageway there would be no unlawful interference with the plaintiffs' rights of way. *Held*, that as the words "in and over the passageway and open court on the northerly and easterly sides" were unambiguous, and as no rights had been acquired by prescription, the rights of the plaintiffs could not be extended by their unopposed use of the whole surface of the court, and that the way and the court were not commensurate in width. *Held, also*, that the plaintiffs could not be deprived of the access of light and air so far as these were indispensable for the proper use of a passageway of the dimensions which had been established by the master, and that the defendant must leave such openings for light and ventilation as might be found to be necessary for the convenient use of the way.

BILL IN EQUITY, filed in the Superior Court on October 24, 1905, as follows:

"And the plaintiffs say that:

"1. The plaintiff Lipsky is the present owner of a certain parcel of land with the buildings thereon and appurtenances thereto numbered 59–61 Salem Street in said Boston, also of two parcels of land with the buildings thereon and appurtenances thereto situated in the rear of 59–61 on said Salem Street being lots marked 'C,' 'D' and 'E' on a plan recorded with Suffolk Deeds Book 1083, page 314, a copy of which plan is hereto annexed, and the plaintiff Goldstein is the present owner of a parcel of land with the buildings thereon and appurtenances thereto numbered 65 on said Salem Street, being lot 'A' on said plan.

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"2. The defendant is the present owner of a parcel of land with the buildings thereon numbered 63 on said Salem Street being lot 'B' on said plan and that said lots A, C, D and E adjoin said lot B.

"3. In the rear of said lot 'B' there is an open court and passage-ways, one of which passage-ways leads to said Salem Street, as shown in said plan; said court and passage-ways were laid out by one John F. Bassett who owned all of said parcels in 1871, granting the right of passage-way, drainage and other easements in and over said open court to be used and enjoyed as they now are used and enjoyed for the benefit of said adjoining estate and are a part of a common plan or design which has continued to have definite and fixed limits marked by buildings and fences, for upward of thirty (30) years and that all conveyances to date of the several parcels were made subject to said rights, privileges, easements and burdens in and over the open court of said lot 'B.'

"4. The defendant Heller, disregarding the rights, privileges and easements of the plaintiffs, as owners of the adjoining estates, in the said open court, is about to erect an addition to the rear of his building which addition will occupy a substantial part of said open court and is to be of the dimensions appearing in an application for permit for alterations made to the building commissioner of the said City of Boston, a copy of which application is hereto annexed marked 'B.'

"5. The plaintiffs believe and have reason to believe and say that the erection of this addition in said open court is in violation of the plaintiffs' rights, privileges and easements and will greatly diminish in value the plaintiffs' property and that they would suffer irreparable damage thereby.

"6. [Added by amendment] That the said John F. Bassett, the plaintiffs' predecessor in title, by the use of the words 'open court' in the several deeds of conveyances intended to convey and did thereby convey an easement appurtenant to their respective estates, and that said court should remain forever open and thereby be an easement of light and air for the benefit of the granted premises.

"Wherefore the plaintiffs pray

"1. That the defendant, his agents, servants and his con-

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tractor, Nathan Fritz, be forever enjoined and restrained from erecting said proposed addition or any other building or structure in said open court, and that he be enjoined and restrained from interfering in any manner with the plaintiffs' proper use of the rights, easements and privileges in and over said open court, and that the defendant be ordered to preserve and keep said court in the condition heretofore existing, till the further order of the court.

"2. And for such other and further relief as the court may deem meet, in the premises."

On page 314 is a copy of the plan annexed to the bill.

The case was referred to George W. Estabrook, Esquire, as master. The material facts found by the master are stated in the opinion. The plaintiffs filed objections and exceptions to the master's report. The defendant Heller filed objections to the master's report, but filed no exceptions founded thereon.

The case was heard upon the plaintiffs' exceptions to the master's report by *Richardson*, J., who made a final decree that the exceptions be overruled and the master's report be confirmed, and that the plaintiffs' bill be dismissed with costs. The plaintiffs appealed.

The case was argued at the bar in March, 1908, before *Knowlton*, C. J., *Morton*, *Hammond*, *Loring*, & *Braley*, JJ., and afterwards was submitted on briefs to all the justices.

E. Greenhood, (*I. Harris* with him,) for the plaintiffs.

H. W. Bragg, (*P. Pinkney* with him,) for the defendants.

BRALEY, J. By a failure to take exceptions the defendant must be deemed to have accepted the master's report, and the evidence not having been reported, although the plaintiffs duly excepted, they are concluded by his findings of fact. The respective rights of the parties in the land, therefore, must be determined from the report, upon which also depends the question, whether the decree dismissing the bill should be affirmed, or wholly or partially reversed. *Whitworth* v. *Lowell*, 178 Mass. 43. *French* v. *Peters*, 177 Mass. 568, 572. *East Tennessee Land Co.* v. *Leeson*, 188 Mass. 37. In this inquiry, the plaintiffs having informed the master that they did not desire a finding as to any rights of drainage, he left this question undecided, and it is not open on their exceptions and appeal.

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JAMES B. STONE *vs.* WRIGHT WIRE COMPANY.

Suffolk. March 10, 1908. — June 16, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Contract, Construction. *Net Profits. Partnership.*

In an action to recover for the alleged breach of a contract in writing between the plaintiff and the defendant, a corporation, by which the defendant was to furnish the capital for establishing and conducting the business of manufacturing and selling wire rope and the plaintiff was to furnish his skill and devote all his time to the business, and the "net profits" were to be shared equally between the plaintiff and the defendant, it appeared that the defendant before the making of the contract was engaged in manufacturing wire cloth and that the new business of manufacturing and selling wire rope was to be carried on as a separate department of the defendant's business to be known as the wire rope department, that the amount of capital to be furnished by the defendant was $50,000 and no interest was to be paid on that sum. The contract provided as follows: "The said capital to be represented by proper building or buildings suitable for making rope of various kinds and qualities from wire, with power and machinery sufficient to so manufacture such rope to the amount of $100,000 (present sales price) per annum, and by the amount of capital necessary to purchase or provide the wire necessary for the production of rope to the amount named per annum, meaning that the said party of the first part [the defendant] is to provide all that is necessary for the equipment and establishment of the wire rope business to the extent above specified, together with the proper facilities for carrying on the same and the same is to be provided as soon as practicable." Another provision of the contract was as follows: "In ascertaining the net earnings the cost or expenses of the business shall be made up the same as if this department were a separate company allowing for taxes on the capital employed and other charges as usual." In computing the "net earnings" to be shared with the plaintiff under the contract in a certain year the defendant charged against the gross earnings, a sum for depreciation of buildings and machinery, another for power furnished by it to the wire rope department, another for repairs, another for insurance, and another for a loss of finished product destroyed while in a warehouse "hired maintained and managed" by the wire rope department. The plaintiff objected to each of these charges, and rested his claim for damages upon his alleged right to have them disallowed. *Held*, that each of these charges was a proper deduction in computing the "net profits" to be shared equally by the plaintiff and the defendant under the contract, and that for this purpose it did not matter whether the contract created a partnership, as, if it did not, the plaintiff was to be paid for his services in "net profits" on the same basis as if the plaintiff and the defendant had been partners; that, in computing the net profits of a business, depreciation, repairs and loss of finished product are proper charges against gross earnings; that insurance was a "usual" charge of a business within the meaning of the provision of the contract above quoted, and that, without such provision, the deduction was a proper one, if the plaintiff did not object to the buildings and machinery furnished by the defend-

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ant as capital being insured; and that the charge for "power" also was deducted properly, as the provision in the contract that the defendant should provide proper buildings "with power and machinery sufficient to so manufacture such rope" meant that the defendant should provide buildings equipped with power and not that the power should be furnished free of charge.

CONTRACT for the alleged breach of an agreement in writing, dated December 2, 1902, the material parts of which are described in the opinion. Writ dated November 16, 1907.

In the Superior Court the case was submitted upon an agreed statement of facts to *Richardson*, J., who made an order that judgment *pro forma* be entered for the defendant. Such a judgment was entered; and the plaintiff appealed.

A. H. Russell, for the plaintiff.

C. M. Thayer, for the defendant.

LORING, J. The questions presented on this appeal grow out of a contract made between the defendant corporation, as the party of the first part, and the plaintiff together with one Waites, since deceased, as the parties of the second part.

This was a contract for the establishment and conducting of the business of manufacturing and selling wire rope. The capital was to be furnished by the corporation (the party of the first part). The parties of the second part were to furnish their skill and to devote all their time to the business. The "net profits" were to be shared equally between the two.

It appears from the terms of the contract that before the making of it the defendant was a corporation engaged in manufacturing wire cloth, and the new business of manufacturing and selling wire rope was to be carried on as a separate department of the business of the corporation, to be known as the wire rope department. The amount of capital to be furnished by the corporation was fixed by the contract at $50,000, if the sales of wire rope did not exceed $100,000 a year, and no interest was to be paid on that sum. The contract contained this provision: "The said capital to be represented by proper building or buildings suitable for making rope of various kinds and qualities from wire, with power and machinery sufficient to so manufacture such rope to the amount named per annum, meaning that the said party of the first part is to provide all that is necessary for the equipment and establishment of the wire rope

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business to the extent above specified, together with the proper facilities for carrying on the same and the same is to be provided as soon as practicable."

In making up the joint account for the year ending August 31, 1907, the corporation charged against the gross earnings of the business a sum for depreciation of buildings and machinery, another for power furnished by it to the wire rope department, another for repairs, another for insurance, and a fifth for loss of finished product destroyed while in a warehouse "hired, maintained and managed" by the wire rope department. The plaintiff objected to each and all of these charges against the gross earnings, and this action was brought to test the right to make them. No question of the reasonableness of the amounts charged in the year in question is presented here. The only question now raised is the right of the defendant to make any charges against gross earnings of the character here in question.

On the right and propriety of making such charges against the gross earnings to ascertain the "net profits," there can be (in our opinion) no doubt. And it is not necessary to invoke the special provisions of the fifth article of the contract which provides that "in ascertaining the net earnings the cost or expenses of the business shall be made up the same as if this department were a separate company, allowing for taxes on the capital employed and other charges as usual."

Had all the capital been furnished in money in place of being "represented by proper building or buildings . . . with power and machinery, . . . and by the amount of capital necessary to purchase or provide the wire necessary for the production of rope to the amount named per annum," the propriety of these charges would have been plain.

So far as depreciation, repairs and loss of finished product are concerned, they are a proper charge against gross earnings, because there can be no "net profits" in a partnership until the capital is made good.

It is of no consequence here that the parties of the first and second parts were not (if they were not) technically partners. The parties of the second part were to receive for their services one half of the "net profits," and in ascertaining the net profits "taxes on the capital employed and other charges as usual"

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were to be made. If the two parties to the contract were not partners, the plaintiff and his associate were to be paid for their services in "net profits" on the same basis as would have resulted had they been partners.

The contract before us is not like an agreement to farm land on shares, as urged by the plaintiff. That is an agreement to halve the gross earnings, not the "net profits."

Insurance is a "usual charge" of a business, and so it comes within article 5. Apart from that, if the plaintiff did not object to the buildings and machinery furnished by the defendant as capital being insured, he cannot object to it as a charge to be deducted from gross earnings to get the "net profits." If the buildings or machinery had not been insured and had been burned, the whole value would have been chargeable against gross earnings.

The remaining charge is that for power. The plaintiff contends that he is charged with power twice. His contention is that by the terms of the contract power is part of the $50,000 of capital represented by proper building or buildings, with power and machinery, and the defendant is paid for the use of the power used as it is paid for the use of the buildings, and that the power is charged for by the corporation a second time in the charges now made against gross earnings. But the provision as to "power" in the contract is not a provision that power shall be furnished as well as buildings. It is a part of the description of the buildings to be furnished, namely, buildings with power and machinery sufficient to manufacture wire rope to the amount of $100,000 a year. The exact wording of the article is: "The said capital to be represented by proper building or buildings suitable for making rope of various kinds and qualities from wire, with power and machinery sufficient to so manufacture such rope to the amount of $100,000 (present sales price) per annum." The defendant is no more precluded from charging for power furnished to operate the machinery than it would be if it furnished the employees for the same purpose.

Judgment affirmed.

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SELIG LIPSKY & another *vs.* JACOB S. HELLER & another.

Suffolk. March 11, 1908. — June 16, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & RUGG, JJ.

Equity Pleading and Practice, Master's report. *Easement. Way. Light and Air.*

A party to a suit in equity who fails to file exceptions to a master's report in support of objections which he has filed is deemed to have accepted the report.

Where a master's report does not report the evidence a party to the suit who has filed exceptions to the report is none the less concluded by the master's findings of fact.

Where the plaintiff in a suit in equity informs the master to whom the case has been referred that he does not desire a finding on one of the matters included in his bill and the master accordingly leaves this question undecided, no objection on this ground is open to the plaintiff on exceptions to the master's report or on an appeal from a decree confirming it.

One owning land in a city divided it into five lots as shown on a plan, two of the lots and the rear portions of the others being accessible from a public street only by the use of passageways and an open space or court designated on the plan. He made separate deeds of four of the lots designating each by reference to the plan, which was recorded in the registry of deeds. The deeds of three of these lots granted a right of way in, along or over the court and passageways to a public street in common with others having a like easement or to whose estates such rights were granted as appurtenant, and in two of these deeds the open space was referred to as "a court" or "an open court." The open space was at the back of the fourth lot, and the deed of that lot described it as "subject to a right of way . . . in and over the passageway and open court, on the northerly and easterly sides appurtenant to the other estates designated on said plan." Later the same grantor sold and conveyed the fifth lot by deeds containing no effectual reference to the plan or the easement. *Held*, that the grantor by his deed of the fourth lot, making it subject to the right of way as described above, excepted such easement for the benefit of the fifth lot which he then owned, that being one of the "other estates designated on said plan" to which the right of way was appurtenant.

By describing land in a deed as bounding on "an open court," which belongs to the grantor, and granting a right of way "in along or over" such court and certain passageways connecting therewith, no easement of light and air over the court is created, where it does not appear that at the time of the conveyance such an easement was indispensable for the reasonable enjoyment of the land conveyed.

In a suit in equity by the respective owners of two lots of land upon a city street abutting in the rear upon an open court constituting the back portion of a lot of land belonging to the defendant fronting on the same street between the lots of the two plaintiffs, to restrain the defendant from extending his building over the open space or court in which the plaintiffs claimed rights of way and easements of light and air, it appeared that all of the lots formerly had belonged to

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the same person, who divided the land into these lots according to a plan recorded in the registry of deeds, that in the deeds the lots of the plaintiffs were bounded upon the open space described as "a court" or an "open court," that the land of the defendant was made "subject to a right of way . . . in and over the passageway and open court, on the northerly and easterly sides appurtenant to the other estates designated on said plan," that the court was connected with a public street by a passageway under the defendant's building, and that another passageway led from the other end of the court along the rear of the lot of one of the plaintiffs. There were no words in the deeds creating an easement of light and air and it did not appear that at the time of the conveyances to the plaintiffs such an easement was indispensable for the reasonable enjoyment of the land conveyed, and it was held that no such easement was created. A master to whom the case was referred found, that the use of the whole surface of the court for passage had been general and unopposed, and that such surface had been repaired at the expense of the lot owners, that no definite assignment of the location and width of the way in the court had been established by user, and that the plaintiffs were entitled to a convenient way, which he located along the northerly and easterly sides of the court, making its width the same as that of the covered passageway under the defendant's building through which access to the street was obtained. He found that if the way was so arched or built over as to correspond in height with the existing covered passageway there would be no unlawful interference with the plaintiffs' rights of way. *Held*, that as the words "in and over the passageway and open court on the northerly and easterly sides" were unambiguous, and as no rights had been acquired by prescription, the rights of the plaintiffs could not be extended by their unopposed use of the whole surface of the court, and that the way and the court were not commensurate in width. *Held, also*, that the plaintiffs could not be deprived of the access of light and air so far as these were indispensable for the proper use of a passageway of the dimensions which had been established by the master, and that the defendant must leave such openings for light and ventilation as might be found to be necessary for the convenient use of the way.

BILL IN EQUITY, filed in the Superior Court on October 24, 1905, as follows:

"And the plaintiffs say that:

"1. The plaintiff Lipsky is the present owner of a certain parcel of land with the buildings thereon and appurtenances thereto numbered 59–61 Salem Street in said Boston, also of two parcels of land with the buildings thereon and appurtenances thereto situated in the rear of 59–61 on said Salem Street being lots marked 'C,' 'D' and 'E' on a plan recorded with Suffolk Deeds Book 1083, page 314, a copy of which plan is hereto annexed, and the plaintiff Goldstein is the present owner of a parcel of land with the buildings thereon and appurtenances thereto numbered 65 on said Salem Street, being lot 'A' on said plan.

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in writing they shall not be allowed to say that the agreement was something else. For this reason testimony at a trial showing an oral agreement which tends to vary the terms of a contemporaneous contract in writing between the same parties can have no effect to change the terms of the contract although it has been admitted without objection and has become a part of the evidence in the case.

If the claim of the plaintiff in an action of contract is founded solely on an oral agreement between him and the defendant, which has been put in evidence but on which the plaintiff has no right to rely because it varies the terms of a contemporaneous contract in writing between them, which also is in evidence, the question of the plaintiff's right to recover properly may be raised by a motion that a verdict be ordered for the defendant, and such a motion must be granted.

In an action by an insurance agent against the general agent of an insurance company upon an alleged oral agreement that if the plaintiff should leave the company at any time the defendant would pay him commissions for two years thereafter on all renewal premiums paid on policies written by the plaintiff for the company, provided the defendant remained with the company, the plaintiff testified that at a certain time negotiations took place between him and the defendant in regard to the signing of a renewal contract of his employment as agent, that the defendant at first refused to renew the oral agreement in regard to commissions on renewal premiums, but that finally the defendant said, in substance, that if the plaintiff would sign the contract the defendant would allow him the commissions for two years in case he should leave the company at any time, that the plaintiff asked the defendant to put that into the contract, but that the defendant said that he could not do that as the company would not indorse the contract, but that he would agree orally to pay the commissions so long as he remained with the company, and that shortly after this conversation the renewal contract of the plaintiff's employment as agent was signed by the plaintiff and the defendant, and continued in force until the plaintiff severed his connection with the company. No objection was made to the admission of the testimony in regard to the oral agreement. The contract in writing provided in detail what commissions on renewals and other premiums should be paid to the plaintiff, and also provided for the payment in certain contingencies of commissions on renewal premiums for two years after the plaintiff should have ceased to act as agent of the company. The contract also contained the following provision: "It is further understood and agreed that upon the discontinuance of this contract in any way, all interest of said agent in this contract in commission on premiums shall revert back to said general agent, except as above mentioned and upon the deferred semi-annual and quarterly premiums on new business, unless it is otherwise specially agreed." The plaintiff contended that by the oral contract sued upon by him it was "otherwise specially agreed" within the meaning of the phrase last quoted. *Held*, that the phrase relied upon by the plaintiff referred only to future special agreements and did not mean that the contract in writing could be rendered nugatory by contemporaneous oral agreements; therefore, that, without considering certain other provisions of the contract in writing which appeared to be fatal to the plaintiff's contention, and without considering whether the alleged agreement was within the statute of frauds as one not to be performed within a year, or other matters of defense, the plaintiff could not be allowed to recover on the oral agreement which by his own testimony varied the terms of the agreement in writing between him and the defendant, and that a verdict properly was ordered for the defendant.

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MORTON, J. This is an action of contract to recover commissions on renewal insurance premiums under an oral agreement alleged to have been made between the plaintiff and defendant in October, 1897. The premiums on which it is sought to recover commissions were paid between March 1, 1902, and January 15, 1903. At the close of the plaintiff's evidence the judge, on the defendant's motion, ordered a verdict for the defendant, and the case is here on exceptions by the plaintiff to the ruling thus made. The plaintiff also excepted to the exclusion of certain evidence, but those exceptions have not been argued, and we, therefore, treat them as waived.

There was evidence tending to show that the defendant had been for many years a general agent of the Northwestern Mutual Life Insurance Company in Boston, and that in the spring of 1896 the plaintiff became a special agent of that company under the defendant pursuant to a written contract entered into between them bearing date May 1, 1896, and expiring August 1, 1897. This contract was substantially the same as the renewal contract subsequently entered into between the plaintiff and the defendant dated October 6, 1897, in connection with which the alleged oral agreement was made. The plaintiff testified, in substance, that, in connection with the signing of the contract of May 1, 1896, the defendant orally agreed that if the plaintiff should leave the company at any time he would pay him commissions for two years thereafter on all renewal premiums paid on policies written by the plaintiff for the company, provided the defendant remained with the company. The plaintiff also testified that in the year 1897 negotiations took place between himself and the defendant in regard to the signing of a renewal contract, and that the defendant, at first, refused to renew the oral agreement in regard to commissions on renewal premiums, but that finally the defendant said, in substance, that if the plaintiff would sign the contract he would allow him the commissions for two years in case he should leave the company at any time; that the plaintiff asked the defendant to put that into the contract, but that the defendant said that he could not do that as the company would not indorse the contract, but that he would agree orally to pay the commissions so long as he remained with the company, and that, shortly after this conversation, the renewal

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contract was executed by the plaintiff and the defendant. The plaintiff continued under this contract until March, 1902, when he severed his connection with the company. The plaintiff further testified that he kept an account of the policies which he wrote, and that his claim was made up from the account thus kept. There was no other evidence in regard to the amount of renewal premiums received by the company on policies written by the defendant. The exceptions recite that at the argument on the motion that a verdict be directed for the defendant "no claim was made on this point," but it is immaterial whether there was or not so far as the right of the defendant to take advantage of it now is concerned. No objection was made to the introduction of the testimony in regard to the oral agreement.

We are of opinion that the ruling was right. The written agreement provides in detail what commissions on renewal and other premiums shall be paid, and when, and also provides for the payment in certain contingencies of commissions on renewal premiums for two years after the plaintiff shall have ceased to act as agent for the company. The oral agreement provided, in effect, that if the plaintiff should leave the company at any time and under any circumstances he should receive commissions on renewal premiums for two years thereafter, and therefore tended directly to vary and add to the written contract and testimony tending to support it was incompetent and could not properly be considered. The rule forbidding the introduction of parol testimony to vary or contradict a written agreement is not merely one of evidence, though commonly, perhaps, so spoken of, but one of substantive law, and rests on the doctrine that when parties have deliberately put their agreements in the form of a written contract they shall not be allowed to show that the agreement was something else. The rule is not affected in its application by the fact that incompetent parol testimony is introduced without objection. *Black* v. *Bachelder*, 120 Mass. 171. Thayer, Prelim. Treat. on Ev. 390 *et seq.* Inasmuch as the only foundation for the plaintiff's claim was the oral agreement alleged to have been entered into, it follows that, if he cannot be allowed to show the oral agreement, he cannot maintain his action. The question whether he could maintain his action in any aspect

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of the case was properly raised by the motion to direct a verdict for the defendant. See *Black* v. *Bachelder*, *ubi supra*.

The plaintiff contends, however, that the evidence was admissible under the provision in the contract that "it is further understood and agreed that upon the discontinuance of this contract in any way, all interest of said agent [the plaintiff] in this contract in commission on premiums shall revert back to said general agent, except as above mentioned and upon the deferred semi-annual and quarterly premiums on new business, unless it is otherwise specially agreed." And he says that it was "otherwise specially agreed" in this case. One answer that could be made, perhaps, to this contention is that the contract subsequently provides that "nothing shall be construed as a deviation from the terms of this contract or as a waiver of any of the rights and privileges of said general agent or the said company, except a written memorandum in each instance expressing such waiver and subscribed by the party against whom such waiver shall be claimed." If the oral agreement is to be construed as a deviation from the terms of the contract, then, clearly, this provision was not complied with. It might also be said that the oral agreement was inconsistent with another provision of the contract, namely: "And it is further agreed by said agent [the plaintiff] that he will do no business for any other insurance company so long as he retains an interest in this contract without first obtaining the written consent of said general agent." The oral agreement would permit the plaintiff to leave and go to work for another insurance company without obtaining the defendant's written consent, and, at the same time, to retain an interest in the contract. But we think that the true construction of the phrase relied on is that it refers to the future. Otherwise it would be competent for the parties by a contemporaneous oral agreement to render nugatory one or all of the elaborate provisions contained in the written contract in relation to the payment of commissions and in relation to other matters. Such a result could not, we think, have been intended by the parties. See *Batchelder* v. *Queen Ins. Co.* 135 Mass. 449; *Barrett* v. *Union Ins. Co.* 7 Cush. 175.

The defendant further contends that the ruling can be supported on the ground that the agreement was within the statute

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of frauds as not to be performed within one year, and on the ground that there was nothing to show, as the case was left, that any, and, if any, what premiums had been paid, and therefore nothing to show what, if anything, the plaintiff was entitled to. But in view of the conclusion to which we have come on the other branch of the case, it is not necessary to consider the questions thus raised.

Exceptions overruled.

A. Lincoln, for the plaintiff.

H. W. Dunn, (*J. N. Clark* with him,) for the defendant.

GUY W. COX & another, trustees, *vs.* MALDEN AND MELROSE GAS LIGHT COMPANY.

Suffolk. March 12, 1908. — June 16, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Assignment, For the benefit of creditors. *Gas Company. Public Service Corporation. Equity Jurisdiction*, Remedy at law. *Mandamus.*

Under R. L. c. 58, §§ 16, 17, providing that a gas company may stop gas from entering the premises of a person who neglects or refuses to pay the amount due for gas previously supplied to him, but that such company shall not refuse to supply gas to a person because a bill for gas remains unpaid by the previous occupant of the building or premises, a gas company cannot refuse to supply gas to the assignee of a corporation under a voluntary assignment for the benefit of creditors because a gas bill of the corporation remains unpaid.

In the absence of any contract or previous dealings between the parties, a suit in equity cannot be maintained by the occupant of a building against a gas company to enjoin the defendant from wrongfully shutting off gas from the premises of the plaintiff because of an unpaid gas bill of a previous occupant of the premises in violation of the provision of R. L. c. 58, § 17, as the plaintiff has a plain remedy at law by a petition for a writ of mandamus.

BILL IN EQUITY, filed in the Superior Court on December 18, 1907, by the assignees and trustees under a common law assignment for the benefit of assenting creditors of the Crown Dyeing Company, a corporation, the plaintiffs being engaged in carrying on in part the business formerly carried on by that corporation at its factory in Medford, to enjoin the Malden and

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Melrose Gas Light Company from refusing or neglecting to supply the plaintiffs with a suitable supply of gas so long as they should continue to pay the regular gas rates and should comply with all other reasonable and usual regulations of the defendant excepting any requirement by virtue of which the defendant should demand payment of the indebtedness of the Crown Dyeing Company or any previous occupant of the premises.

In the Superior Court the case came on to be heard before *Fox*, J., who at the request of the parties reserved it for determination by this court, such decree to be entered as law and justice might require.

A. S. Davis, for the plaintiffs.

R. P. Clapp, for the defendant, was not called upon.

KNOWLTON C. J. The plaintiffs are assignees and trustees of the Crown Dyeing Company, under a voluntary assignment for the benefit of creditors. This corporation was indebted to the defendant in the sum of $210.20 for gas furnished for use in the building where it conducted its business. These plaintiffs are temporarily continuing the business for the benefit of the creditors, and they desire to use gas in the building as it has been used before. The only question in the case is whether the defendant by this proceeding can be compelled to furnish gas while the corporation and the plaintiffs neglect to pay for that previously furnished. The answer depends upon the R. L. c. 58, §§ 16, 17, which authorize a gas company to stop gas from entering the premises of any person who neglects or refuses to pay the amount due therefor, but forbid a refusal to furnish gas by such a company, merely "because a bill for gas or electricity remains unpaid by a previous occupant of such building or premises." Is there, in reference to the object and meaning of the statute, such identity between the corporation and these plaintiffs, who are its assignees and trustees to wind up its affairs, that they ought to be considered the same party within the meaning of the sixteenth section, and that the corporation ought not to be considered a previous occupant within the meaning of the seventeenth section.

The assignment worked a change of ownership, not only in the legal title but in the interests represented by it. From the time of the assignment the property was held primarily for the

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benefit of the creditors, and it was ultimately to be disposed of for the payment of their debts. Before the conveyance, the previous occupant, the Crown Dyeing Company, held it by an absolute title and could do with it whatever it chose. After the conveyance to the plaintiffs the defendant had a right to payment of its debt, either wholly or in part, from the proceeds of the property in the plaintiffs' hands, as their other creditors had. As against the new title of the plaintiffs it could make no claim for its debt; nor could it interfere with such a use of the property by the plaintiffs as any other purchaser might have made. It never had a lien upon the property. *Turner* v. *Revere Water Co.* 171 Mass. 329. So long as the occupation was unchanged, it might exert pressure upon the occupant to obtain payment by refusing to furnish gas so long as its bill remained unpaid. But against new occupants having their own rights it could not do this. We think that the plaintiffs are entitled to start anew under their title, and that they may use and dispose of the property for the benefit of creditors as any other purchaser might do, subject only to the provisions of the assignment, and to liens which may be enforced by law. R. L. c. 58, § 17. *Turner* v. *Revere Water Co.* 171 Mass. 329. *Merrimac River Savings Bank* v. *Lowell*, 152 Mass. 556.

The plaintiffs, upon petition, would be entitled to a writ of mandamus against the defendant, to compel the delivery of gas, in the performance of a *quasi* public duty under the statute. It does not follow that they can maintain this suit in equity. The remedy at law, already referred to, is perfect. We see no ground for jurisdiction in equity. There is no contract between the plaintiffs and the defendant, and therefore there cannot be a decree for specific performance. The bill is, in substance, to obtain a mandatory injunction to compel the defendant to perform a *quasi* public duty, in the performance of which the plaintiffs have a private interest.

Mandatory injunctions are often granted where the defendant is guilty of a continuing wrong upon the plaintiff, from the further perpetration of which he ought to be enjoined, and where the termination of the wrongful conduct involves a restoration of conditions existing before the wrongful conduct began. They are not granted where the only ground of equitable relief is a

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failure of the defendant to perform an independent public duty which he owes to the plaintiff individually, as well as to others.

There is some ground for contending that, in refusing to furnish gas to the plaintiffs on request, the defendant is guilty of an actionable, continuing wrong upon them, which is in the nature of a nuisance, the maintenance of which may be enjoined in equity. The prayer of the bill seems to be framed on this theory. But we think it is more in accordance with sound principle, in the absence of any contract or previous dealings between the plaintiffs and the defendant, to hold that the mere failure to supply gas on request is only negative conduct, as distinguished from an affirmative, wrongful act which calls for an injunction in equity. We have not been referred to any case in which relief in equity has been granted upon facts like those now before us.

Bill dismissed.

ALICE DRAKE *vs.* MARIA T. ELLIOT & others.

Suffolk. March 12, 1908. — June 16, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Equity Jurisdiction, Fraud. *Insurance*, Life.

In a suit in equity by the daughter of a man, who had died leaving life insurance under a policy which originally had been payable to the plaintiff as beneficiary, against the executor of the will of the widow of the insured, alleging that the defendant's testatrix had falsely represented to the plaintiff's father that she was an unmarried woman and thereby had induced him to marry her and to make the policy of insurance payable to her instead of to the plaintiff, the judge who heard the case ordered that the bill be dismissed, and, the case coming before this court on appeal without any ruling of law or findings of facts having been asked for, it was *held*, that, as the facts disclosed by the record warranted a finding by the judge that there was no fraud on the part of the defendant's testatrix, it was unnecessary to consider whether, if the substitution had been brought about, as alleged, by fraud on the part of the defendant's testatrix, the plaintiff would have had any such vested right as beneficiary under the policy as to entitle her to maintain the bill.

MORTON, J. This is an appeal by the plaintiff from a decree by a judge of the Superior Court dismissing her bill with costs. The evidence was taken by a commissioner and is all before us.

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No rulings of law or findings of facts were asked for, and the decree must stand unless clearly erroneous.

The bill alleges in substance that the plaintiff is the daughter of one Charles G. McKenzie who died in November, 1893; that at the time of his death McKenzie held a policy of insurance on his life for the sum of $2,000, issued by the Grand Lodge of the Ancient Order of United Workmen, which had formerly been made payable to the plaintiff; that defendant's testatrix falsely and fraudulently represented to McKenzie that she was an unmarried woman and thereby induced him to marry her and to make the policy of insurance payable to her instead of the plaintiff; that at his death the insurance money was paid to her by the lodge and at her death passed under her will as a part of her estate to the defendant; and that the facts as to the fraudulent representations to McKenzie by the defendant's testatrix came only recently to the knowledge of the plaintiff. The prayer of the bill is that the defendant may be ordered to pay to the plaintiff the sum so received with interest.

It is to be noted that the essential allegations of the bill are those which relate to the alleged fraud on the part of defendant's testatrix. The burden was on the plaintiff to establish them by a fair preponderance of the evidence. To sustain these allegations she relied on evidence introduced by her and tending, as she contended, to show that at the time of the marriage of defendant's testatrix to McKenzie she had a former husband by the name of Finnegan living. This evidence consisted largely, if not wholly, of the deposition of one James Finnegan taken in Montreal in which he deposed to a former marriage between himself and the testatrix which was still in force. But there was evidence tending to show that if there was such a marriage, the testatrix at the time of her marriage to McKenzie had not heard from Finnegan for many years, and that she had been told that he was dead. This and other evidence in the case warranted a finding, if believed, that she contracted the marriage with McKenzie in good faith, and that the substitution of her name as beneficiary for that of the plaintiff was not procured by fraud on her part. Further, if the presiding judge who heard the case found as a fact, as for aught that appears he did, that, upon all of the evidence and the inferences fairly to be drawn

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from it, he was not satisfied that there had been a marriage to Finnegan, or that, if there had been, the Finnegan who deposed was the man, and was, therefore, unable to find that the testatrix had a former husband living at the time of her marriage to McKenzie, we do not think that such a finding could be held to have been plainly erroneous. Moreover, it appeared that the marriage took place in 1890, but the change in the beneficiary was not made till April, 1893. There was evidence tending to show that the plaintiff lived in her father's family for about a year after the marriage and then owing to some disagreement went to live with an uncle, her father's brother. There also was evidence tending to show that the uncle had caused the plaintiff's father to be turned out of a house which he had conveyed to the uncle's wife under such circumstances that he thought that, in equity and good conscience, he still owned it and that this had given rise to ill feeling. This evidence if believed would furnish, or could be found to furnish, a satisfactory reason for the substitution and to disprove fraud on the part of the defendant's testatrix. It would also warrant a finding that the revocation was intended to be an absolute one irrespective of the validity of the substitution.

We do not find it necessary to consider whether if the substitution had been brought about as alleged by fraud on the part of defendant's testatrix the plaintiff would have any such vested right as to enable her to maintain this bill, nor to consider the question of laches. On the whole case we are of opinion that the decree should be affirmed.

So ordered.

J. J. Feely, (*R. Clapp* with him,) for the plaintiff.

W. D. Turner, (*S. S. Fitz Gerald* with him,) for the defendants.

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EDITH E. D. BLOUNT *vs.* FRANK A. WHEELER & another.

Suffolk. March 13, 1908. — June 16, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Contract, Consideration, What constitutes, Construction, Performance and breach. *Estoppel. Attorney at Law. Equity Jurisdiction*, Specific performance.

At the hearing upon a bill in equity brought by the daughter of a testatrix against the testatrix's son, who was her only other heir or next of kin, to enforce an agreement in writing with regard to the disposition of the estate, it appeared that the defendant, who lived in a distant city, arrived in the city, where his mother had lived, on the afternoon of the day on which she died, that the next morning he told the plaintiff, who had been estranged from her mother for ten years, that "there was a will leaving him everything and her nothing," which was the only knowledge that the plaintiff then had of such a will, that the plaintiff thereupon in good faith stated to the defendant that she would contest the will on the ground of undue influence and want of sanity, and on the evening of that day the plaintiff and the defendant signed the following agreement: "In settlement of the estate of [the mother], it is agreed between [the defendant] and [the plaintiff] that [the plaintiff] will have one third of the estate and [the defendant] will have two thirds," and the plaintiff, in consideration of the defendant's agreement thus to share the estate with her, promised not to make any contest. The funeral of the mother occurred the next day, and, thereafter, the defendant stated that he would not keep the agreement. *Held*, that at the time of the signing of the agreement a contract was made for a valid consideration, from which the defendant could not withdraw.

An agreement by an intending litigant to forbear from litigating a claim, which he in good faith at the time of his agreement thinks is valid, is a good consideration for a contract, although by the state of the law and of the facts as they ultimately are discovered to be, the claim, the prosecution of which is forborne, is neither valid nor enforceable.

At the hearing of a bill in equity to enforce an agreement in writing made between the plaintiff and the defendant, the only heirs at law and next of kin of their mother, lately deceased, as to the disposition of the mother's estate in a manner different from the way in which it was disposed of by a will left by her, it appeared that the agreement was made in consideration of a promise by the plaintiff not to oppose the probate of the will, which gave practically the entire estate to the defendant. On the day before a petition for the probate of the will was filed, the plaintiff employed a lawyer "to enforce the agreement," and gave him no other authority. The lawyer entered his appearance on the probate petition, and the hearing on the petition was continued. The counsel for the person named as executor in the will thereupon prepared for a contest, but, before the date set for a hearing, the plaintiff's lawyer, concluding that the entry of his appearance was a mistake, withdrew it, and the will was proved without opposition. The judge who presided at the hearing upon the bill in equity found "that the plaintiff did not contest the will, and that he was not estopped by the entry of appearance by" the lawyer "or by any acts done in consequence of that

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appearance from contending or proving that he did not contest the will." *Held*, that the findings and rulings of the presiding judge were warranted.

At the hearing upon a bill in equity by the daughter of a testatrix against the testatrix's son, who was her only other heir or next of kin, to enforce an agreement in writing with regard to the disposition of the estate, it appeared that the defendant had announced to the plaintiff, after the mother's death and before her funeral, that she had made a will leaving everything to him and nothing to the plaintiff, which was the only knowledge that the plaintiff then had of such a will, that, after some discussion, the plaintiff and the defendant, in consideration of the plaintiff's forbearing to contest the probate of the will, as she in good faith had intended to do if the compromise had not been made, agreed in writing as follows: "In settlement of the estate of [the mother], it is agreed between [the defendant] and [the plaintiff] that [the plaintiff] will have one third of the estate and [the defendant] will have two thirds." The agreement was written by the plaintiff and both parties acted without legal advice, and in ignorance of their legal duties as to producing and proving the will, but they believed that they could settle the estate without proving the will, which neither of them had seen. The will contained several specific legacies to other persons than the plaintiff or the defendant. The judge who heard the case found that "the belief of the parties that they could settle the estate without probating the will and any understanding based upon that belief were merely incidental to the written agreement, and connected with it as a condition. . . . The agreement, fairly construed in the light of all the surrounding facts, means that such property as might remain in the estate after all lawful claims were paid should be divided in the proportions named, and does not require that the legacies shall not be paid or that the will shall not be probated." *Held*, that the conclusion of the judge was warranted.

A widow, who for ten years had been estranged from her daughter, died, leaving a will which gave specific legacies of small amounts to various persons, $5 to the daughter, and the residue of the estate to a son, who was the only other heir at law or next of kin. The estate was personalty. Upon the daughter's stating in good faith that she intended to contest the probate of the will, the son and she, before the will was examined by either and before it was offered for probate, agreed in writing "in settlement . . . that [the daughter] will have one third of the estate and [the son] will have two thirds." The will thereupon was proved without a contest and a third person named therein appointed executor, and, the son refusing to carry out the agreement, the daughter, by a bill in equity against the son and the executor, sought to compel its performance. *Held*, that the bill might be maintained and the agreement specifically enforced; and, *also*, that such a suit was not an interference with the settlement of the estate in the Probate Court.

BILL IN EQUITY, filed in the Superior Court for the county of Suffolk November 14, 1905, to establish and compel performance of an agreement in writing of compromise made between the plaintiff and the defendant Dillaway (hereinafter called the defendant), who were the only heirs at law and next of kin of their mother, as to the disposition of the mother's estate, which, under her will, had been left almost entirely to the defendant.

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There was a hearing before *Schofield*, J. The agreement relied on was as follows:

"July 29, 1905.

"In settlement of the estate of Georgianna L. Dillaway, it is agreed between Frank Henry Dillaway and Edith Eliza Dillaway Blount that Edith Eliza Dillaway Blount will have one third of the estate and Frank Henry Dillaway will have two thirds of the estate.

"Frank H. Dillaway.
Edith E. D. Blount."

The will of Georgianna L. Dillaway gave a legacy of $5 to the plaintiff, $5 to the plaintiff's daughter, $25 to the defendant Wheeler, whom she named executor, $100 and wearing apparel to a Mrs. Lucy E. Lord, and the residue of her estate to the defendant.

A commissioner was appointed to take the evidence. His report fills two hundred and seventeen pages of the printed record. The presiding judge made a memorandum of his findings of facts and rulings of law, substantially as follows:

"3. The agreement [above set out] was executed on the evening of July 29, which was Saturday. The next day, after the funeral of Mrs. Dillaway [the testatrix], the defendant saw the executor, Mr. Wheeler, and, after an interview with him, told the plaintiff that he would not keep his agreement. The defendant then believed that in order to carry out the agreement it was necessary that the will should not be presented for probate. After the funeral, in his talk with Mr. Wheeler, who acted in entire good faith for the purpose of performing his duty as executor, Dillaway learned that Mr. Wheeler would feel obliged as executor to produce the will.

"4. When the parties entered into the written agreement they supposed that they could rightfully settle the estate without probating the will. They made no express agreement not to present the will for probate, nor did they intend or agree to do any act to deprive legatees or beneficiaries under the will, other than themselves, of any rights under it. The exact details of the provisions of the will were not known to the parties when the agreement was made. On the morning of the twenty-ninth

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the defendant Dillaway told the plaintiff there was a will leaving him everything and her nothing. This was the only knowledge she had of the contents of the will. She then told her brother she would contest it, for undue influence and on the ground of want of sanity. . . .

[Here followed the paragraph quoted in the paragraph of the opinion numbered four.]

"6. The defendant Dillaway testified that, when he told his sister that he would not keep his agreement, her husband said, 'Very well, wife, then we will contest the will.' This is denied by the plaintiff and her husband. Upon all the evidence the court finds that no agreement of rescission of the written contract was made. The parties did not then clearly understand their rights. . . .

[Here follows the paragraph quoted in the paragraph in the opinion numbered three with regard to the acts of Mr. Hodgdon.]

"8. The court finds that the written agreement of July 29 was supported by sufficient consideration. The plaintiff in good faith stated to the defendant, her brother, that she would contest the will on the ground of undue influence and want of sanity, and in consideration of his agreement to share the estate with her promised not to make any contest. The court rules that she is not required to go further and prove that there was a doubtful question as to sanity or undue influence in order to establish a valid consideration. She had the right, acting in good faith, to go to court and make a contest and she promised not to exercise that right, and did not exercise it.

"9. The jurisdiction in equity is sustained upon the ground that the remedy in equity is superior to that at law. The plaintiff may have an action at law upon the written agreement, when the estate is settled. She cannot allege a breach or recover judgment at law until the executor has actually paid the residue of the estate to defendant Dillaway. *Daniels* v. *Newton*, 114 Mass. 530. Equity will establish the right of the plaintiff in advance, and prevent payment to defendant Dillaway, and order the executor to pay direct to the plaintiff in accordance with the agreement when the time for payment arrives.

"10. A decree may be prepared for the plaintiff in accord-

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ance with the foregoing directions, and providing for the execution of such orders and acquittances by the defendant Dillaway and by the plaintiff as may be necessary for the protection of the executor. The total amount of the estate is $5295, consisting of deposits in savings banks."

Other facts are stated in the opinion.

A decree was entered according to the memorandum, and the defendants appealed.

H. D. McLellan, (*L. G. Roberts* with him,) for the defendants.

E. Greenhood, for the plaintiff.

LORING, J. This is a bill brought by a sister against her brother and against the executor of the will of their mother. The plaintiff seeks to establish an agreement of compromise between her brother and herself as to the will and property of their mother, and to have the executor directed to pay to her one third of the residue when his accounts are settled in the Probate Court and the time for distribution shall have come.

The mother died at 1.30 A. M. on Friday, July 28, 1905, at the City Hospital. There had been an estrangement between the plaintiff and her mother for some ten years. The brother lived in New York. He reached Boston in the afternoon of the day of his mother's death, and went directly to the house of the plaintiff in Everett. The judge found that "on the morning of the twenty-ninth the defendant Dillaway told the plaintiff there was a will leaving him everything and her nothing. This was the only knowledge she had of the contents of the will." They made the agreement of compromise on the evening of that day. By this agreement the plaintiff promised not to contest the will and the defendant promised that he would share with her, she taking one part and he two parts of the estate.

The mother was buried on Sunday. After the funeral the brother told his sister that he would not keep his agreement. The will was admitted to probate on September 28, without opposition, and this bill was filed on November 14.

The cause was heard on the merits, the evidence being taken by a commissioner. The judge made findings of the material facts and ordered a decree to be entered for the plaintiff. In pursuance of that order a decree was entered declaring that by

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virtue of the agreement of compromise the plaintiff was entitled to one third of all moneys coming to the defendant in addition to one third of the legacy of $5 bequeathed to her, and directing the defendant Wheeler as executor to make said payments after the settlement of his final account in the Probate Court. It was further provided in said decree that the plaintiff should have the same standing in the probate proceedings that she would have had if the plaintiff and defendant had been residuary legatees.

The case is now before us on an appeal by both defendants.

1. The first contention of the appellants is that the offer of the defendant was by its terms to ripen into a contract of compromise on the plaintiff's not contesting the probate of the will, that it was withdrawn before the time for such an acceptance came, and therefore no contract ever came into existence. But the plaintiff testified that when the defendant made the offer to her she told him that she would not contest the will. The judge in terms found that to be true. He found that "the plaintiff in good faith stated to the defendant, her brother, that she would contest the will on the ground of undue influence and want of sanity, and, in consideration of his agreement to share the estate with her, promised not to make any contest." After a careful examination of the whole evidence we see no reason to overturn that finding.

2. Their second contention is that on the evidence there was as matter of law no valid consideration because it was not proved that the plaintiff had a fair chance of success in contesting the will. Their argument in support of this contention is that forbearance to prosecute an invalid claim is not a valid consideration for a promise unless "the promisee as a reasonable person believed that she had some fair chance of already succeeding in the contest." As we have already said, the judge found that the plaintiff "acted in good faith" in stating that she would contest the will and in agreeing not to contest it in consideration of his agreement to share with her. The judge further ruled "that she is not required to go further and prove that there was a doubtful question as to sanity or undue influence in order to establish a valid consideration. She had the right, acting in good faith, to go to court and make a contest and she promised not to exercise that right, and did not exercise it."

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There are decisions in other jurisdictions for the position taken by the appellants. A collection of the decisions to that effect may be found in Wald's Pollock on Contracts (3d Am. ed.) 214, note 28.

But since the decision of this court in *Prout* v. *Pittsfield Fire District*, 154 Mass. 450, those cases are not law in this Commonwealth, and the earlier case of *Palfrey* v. *Portland, Saco & Portsmouth Railroad*, 4 Allen, 55, must be taken to be modified accordingly. This court in *Prout* v. *Pittsfield Fire District* adopted the rule finally established in England in *Miles* v. *New Zealand Alford Estate Co.* 32 Ch. D. 266, in which *Cook* v. *Wright*, 1 B. & S. 559, *Callisher* v. *Bischoffsheim*, L. R. 5 Q. B. 449, *Ockford* v. *Barelli*, 20 W. R. 116, and the doubts thrown on those decisions by Lord Esher, M. R., in *Ex parte Banner*, 17 Ch. D. 480, 490, were considered at length. The rule there laid down was stated on page 291 with accuracy by Lord Bowen to be: "If an intending litigant *bona fide* forbears a right to litigate . . ., he does give up something of value." He added, speaking of the case then before him, "I think therefore that the reality of the claim which is given up must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession." Again, on page 292, Lord Bowen says: "When the Master of the Rolls in *Ex parte Banner* [17 Ch. D. 480] says he doubts, if there was really and obviously no cause of action, whether the belief of the parties that there was, would be sufficient ground for a compromise, I agree if by that he means there must be a real cause of action, that is to say, one that is *bona fide* and not frivolous or vexatious; but I do not agree if he means by a real cause of action some cause of action which commends itself to the ultimate reasoning of the tribunal which has to consider and determine the case."

The case of *Prout* v. *Pittsfield Fire District* was affirmed in *Kennedy* v. *Welch*, 196 Mass. 592. In the case at bar, having regard to the knowledge of the plaintiff, can it be said that her claim was a vexatious or frivolous one? Unless a duly executed will had been made, she was entitled as one of the two next of kin to a half of her mother's estate. She had just been told by the other next of kin, her brother, that their mother had left a

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will by which everything had been bequeathed to him. Even although she had been estranged from her mother for ten years, a determination to examine the will and the circumstances under which it had been made could not be said (having regard to the knowledge of the plaintiff) to be either vexatious or frivolous. We are of opinion that this finding and this ruling were right. The claim in *Palfrey* v. *Portland, Saco & Portsmouth Railroad*, 4 Allen, 55, was a frivolous and vexatious one.

3. The next contention made by the appellants is that the plaintiff did not keep her agreement not to contest the will. Whether what was done by the plaintiff and her attorney did or did not amount to a performance of that promise depended upon the credit given by the judge to the conflicting stories told on one side and the other. It is enough to say that the judge believed the story told by the plaintiff's witnesses. His finding on this point was as follows: "The will was presented for probate in the Probate Court on August 1, 1905. The plaintiff on the day before had employed Charles W. Hodgdon, an attorney at law, and instructed him to enforce the agreement. This was the only authority given to the attorney. Mr. Hodgdon entered his appearance on the probate petition as attorney for Mrs. Blount. The case was continued to September 28, when the will was admitted to probate without contest, and no appeal was taken. Before that date Mr. Hodgdon had concluded that the entry of his appearance was a mistake, as a means of enforcing the agreement, and on September 27 withdrew it, after consulting with other counsel. Mr. Roberts, the attorney for the executor, after the entry of Mr. Hodgdon's appearance and after conversation with him, believed that the will was to be contested, and made some preparation for a contest before the appearance of Mr. Hodgdon was withdrawn. The court finds as a fact that the plaintiff did not contest the will, and that she is not estopped by the entry of appearance by Mr. Hodgdon in the probate court, or by any acts done in consequence of that appearance from contending or proving that she did not contest the will."

4. The fourth contention made by the appellants is that the agreement of compromise is an agreement between the plaintiff and her brother to divide the estate without probate of the will. This was disposed of by the judge in these words: "The belief

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of the parties that they could settle the estate without probating the will and any understanding based upon that belief were merely incidental to the written agreement, and not connected with it as a condition. Both parties were acting without legal advice when the agreement was made, and in ignorance of their legal duties in regard to the production and probating of the will. The court finds that the written agreement fairly construed in the light of all the surrounding facts means that such property as might remain in the estate after all lawful claims were paid should be divided between the parties to it in the proportions named, and does not require that the legacies shall not be paid or that the will shall not be probated." We agree with that conclusion.

5. The last position taken by the appellants is that there is no jurisdiction in equity.

We do not stop to consider whether this objection was taken at the proper time, for we are unanimously of opinion that the position is not sound.

The jurisdiction of this court specifically to enforce an agreement of compromise of a will where some of the property in question is real estate was upheld in *Leach* v. *Fobes*, 11 Gray, 506. The question now presented is not covered by that case because the property now in question consists of personalty only.

We are, however, of opinion that in such a case as that now before us an agreement of compromise will be specifically enforced.

One who contests the validity of an instrument offered as the last will of another, under which the contestant claims as next of kin, and who by an agreement of compromise becomes entitled to a share of the residue, is entitled to the same standing in the probate proceedings that a person has to whom part of the residue is bequeathed. This right is expressly given to the plaintiff by the decree now under consideration. The right of such a contestant to such a standing in the probate proceedings is recognized in decrees establishing an agreement of compromise under R. L. c. 148, § 15, where the aid of the court is necessary for making the compromise. It is the practice to insert a clause in decrees made under that act, providing that the executor

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shall administer the estate in accordance with the agreement of compromise established by the decree. See in this connection *Bartlett* v. *Slater*, 182 Mass. 208; and in connection with that case see *Hastings* v. *Nesmith*, 188 Mass. 190. That practice is not decisive of the jurisdiction in equity in the case at bar. The jurisdiction in equity in those cases is given by the statute (R. L. c. 148, § 15), and the insertion in such decrees of the clause just spoken of might well stand as a clause necessary to do complete justice when equity has taken jurisdiction for another purpose.

We are, however, of opinion that the right recognized by this clause is a ground for equity's taking jurisdiction, and that in cases where there is no necessity for action under R. L. c. 148, § 15, to make a compromise valid (see *Abbott* v. *Gaskins*, 181 Mass. 501, 506), if the rights of the contestant under such an agreement of compromise are not recognized by the executor, the contestant can by a bill in equity compel him (the executor) to recognize the rights given him (the contestant) under the agreement of compromise. Were this not so the executor and the other party to the compromise could settle the estate without reference to the contestant, leaving to him only a right to collect by an action at law the share so established. That does not give him what he is entitled to.

There is nothing in the further objection that such a bill in equity as that now before us and the decree entered in the Superior Court are an undue interference with the settlement of the estate in the Probate Court. Where a bill for instructions is brought in the Supreme Judicial Court by a trustee appointed by the Probate Court, his accounts are settled there and the distribution of the amount so found due is made here. See *Brown* v. *Wright*, 194 Mass. 540; *Green* v. *Gaskill*, 175 Mass. 265. The same method of proceeding should be followed in cases like the case at bar.

Decree affirmed.

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ALBERT F. HAYWARD & another, executors, *vs.* CORINNE L. HAYWARD & others.

Plymouth. March 13, 1908. — June 16, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Devise and Legacy. Executor and Administrator.

A testatrix, who at the time of her death was sixty-eight years of age and never had been married, owned but one piece of real estate, upon which were two tenement houses so built that a line which would divide the land through the middle from front to rear would lie wholly between the houses. This real estate was subject to a mortgage which, together with the other debts of testatrix, her personal property was insufficient to pay. The will bequeathed to two nephews $100 each, to a niece C. a diamond ring, to a niece E. a gold watch and chain, to two brothers all money which she had after the legacies were paid and to one of such two brothers "all the rest and residue of my personal property of every description." She devised to her niece C. "one undivided half of all the real estate of which I am now or of which I may hereafter die seised or possessed or be in any manner entitled at the time of my decease," and devised "the rest residue and remainder of my real estate of which I am now, or of which I may hereafter die seised or possessed, or be in any manner entitled at the time of my decease" to trustees for the benefit of her niece E. *Held*, that the will exhibited no intention on the part of the testatrix to make the devise to C. subject to the mortgage, and that therefore it should not be so subjected until after the personal property and the other half of the real estate, which had been devised in trust for E. by the residuary clause, had been exhausted.

BILL IN EQUITY, filed in the Probate Court for the county of Plymouth on April 23, 1907, by the executors of the will of Hannah Corinna Hayward, late of Brockton, seeking instructions as stated in the opinion.

After a hearing before *Chamberlain*, J., in the Probate Court, a decree was entered that the real estate devised to the defendant Corinne Louise Hayward was not exonerated from contributing to the payment of a mortgage upon it and that which was devised in trust for Edith Howland Hayward.

On appeal, the case was heard before *Loring*, J., who reversed the decree of the Probate Court and directed the executors to apply to the payment of the mortgage debt, first, the residue of the personal property, and, second, the land devised in trust for Edith Howland Hayward; and the latter appealed.

The case was submitted on briefs.

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W. Goddard, for the plaintiffs, and for Edith Howland Hayward and Henry W. Flagg, trustee, defendants.

H. F. Parker, for the defendant Corinne Louise Hayward.

MORTON, J. This is a bill in equity by the executors for instructions concerning the construction of the will of one Hannah Corinna Hayward. It comes here on appeal from the decree entered by the single justice reversing, on appeal, the decree of the Probate Court. The evidence before the single justice was taken by a commissioner and is all before us. By her will the testatrix, after directing the payment of her just debts and funeral charges, and constituting and appointing her brothers Albert Francis Hayward and John Parker Hayward executors and her brother John Parker Hayward trustee, with provision for the appointment of a successor in case of the death of either, gave to her two nephews $100 each, to her niece Corinne Louise Hayward, daughter of Albert F., her diamond ring, to her niece Edith Howland Hayward, daughter of John Parker, her gold watch and chain, to her brothers in equal shares all money which she had on deposit or otherwise at the time of her decease after payment of the preceding legacies, and to her brother Albert Francis "all the rest and residue of my personal property of every description." Then come the devises which give rise to the questions before us:

"I give and devise to said Corinne Louise Hayward one undivided half of all the real estate, of which I am now, or of which I may hereafter die seised or possessed or, be in any manner entitled at the time of my decease.

"I give and devise all the rest residue and remainder of my real estate of which I am now, or of which I may hereafter die seised or possessed or be in any manner entitled at the time of my decease, to said John Parker Hayward, and upon his death as before provided, to Harry W. Flagg, in trust, . . . to pay over the net income thereof for the benefit of said Edith Howland Hayward, for during her natural life, and upon her death leaving issue, then said trust estate shall be paid over to such issue discharged of all trusts." Provisions follow as to what shall be done with the trust estate in case of the death of Edith Howland Hayward without issue, and relating to its management, which are not, we think, material. It appeared that the testatrix

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was at the time of her death sixty-eight years old and had never been married; that she owned a parcel of land on Green Street in Brockton having a frontage of about ninety-two feet; and that on this lot were two two-tenement houses each fronting on the street, and that a line drawn through the middle of the lot from front to rear would lie entirely in the space between the two houses. This was all the real estate which the testatrix had at her decease, and the evidence tended to show that it was the only real estate which she had ever owned. It was subject to a mortgage of $5,000 at the date of the will and at the death of the testatrix. It was agreed at the hearing before the single justice that the personal property was insufficient to pay the debts including the mortgage.

The two questions on which the executors prayed to be instructed were:

"1. Is the devise to said Corinne Louise Hayward a general or specific devise?

"2. Should said devise be exonerated from the said mortgage?"

We do not find it necessary to consider whether the devise to Corinne Louise Hayward was specific or general. If it is to be regarded as a specific devise, it is plain that it is to be exonerated from the mortgage. *Johnson* v. *Goss*, 128 Mass. 433. *Richardson* v. *Hall*, 124 Mass. 228. *Brown* v. *Baron*, 162 Mass. 56. And in view of the residuary clause we think that the same result must follow if the devise to Corinne is to be regarded as a general devise. "This exemption results," to quote the language of Metcalf, J., in *Blaney* v. *Blaney*, 1 Cush. 107, "from the nature and effect of a disposition of property by a residuary devise or bequest. Nothing is given by such a devise or bequest, except on a contingency that something shall remain after all paramount claims on the testator's estate are satisfied." Amongst the paramount claims which are enumerated are those "of other legatees and devisees." See also *Hays* v. *Jackson*, 6 Mass. 148, 154; *Firth* v. *Denny*, 2 Allen, 468; *Wilcox* v. *Wilcox*, 13 Allen, 252, 256; *Bowen* v. *Hoxie*, 137 Mass. 527.

We are unable to construe the will as exhibiting any intention on the part of the testatrix to make the devise to Corinne subject to the mortgage, or to limit the scope and effect of the

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residuary clause. It is manifest, we think, from the will that the testatrix did not intend perfect equality between her two nieces. She gives to Corinne an undivided half of all her real estate, and to Edith all the rest and residue of her real estate. If Corinne had died during the lifetime of the testatrix, Edith would have taken the share devised to Corinne, but Corinne would not have taken the share devised to Edith in case of the latter's death before that of the testatrix. That this difference in the forms of the devises to the two nieces was not unintentional but was of set purpose is shown, we think, by the gift to her brothers of the residue of the personal estate. She first bequeaths to them in equal shares all money which she may have at her decease on deposit or otherwise after payment of the preceding legacies, and then gives to her brother Albert all the rest and remainder of the personal property of every description, thus distinguishing plainly between the two brothers, and showing her understanding of the effect of a residuary clause. And we cannot avoid the inference that she differentiated between the two nieces with a like purpose and that in making the devise to Edith she had in mind not so much the gift of half of her real estate as the gift of the rest and residue of the real estate whatever it might be. It may be that the testatrix thought that each niece would be obliged to pay one half of the mortgage, or it may be that she did not think of the matter at all. But we must take the will as we find it. We see nothing in the creation of a trust in favor of Edith, or in the other provisions of the will, or in the circumstances or situation of the testatrix and of her nieces to control the effect of the residuary devise.

The result is that the decree of the single justice must be affirmed.

So ordered.

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CLIFTON L. BREMER, trustee, *vs.* COLUMBIAN NATIONAL LIFE INSURANCE COMPANY.

Suffolk. March 13, 1908. — June 16, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Trust. Mortgage, Discharge, Assignment. *Payment. Equity Pleading and Practice*, Appeal.

At the hearing upon a bill in equity by a trustee under a will seeking to have an alleged assignment by a former trustee to the defendant of a part of the principal of the trust, consisting of a mortgage note for $6,000 and the mortgage securing it, set aside, it appeared that the will gave the trustee no power to change the form of an investment without an order of the Probate Court, that, before the time of the alleged assignment, the mortgage note in question being overdue, the trustee demanded payment from one to whom the mortgagor had conveyed the equity of redemption and agreed with the owner's agent that, if the agent would procure funds and pay the mortgage, he would allow him $50. There was evidence tending to show that the owner of the equity through his agent thereupon applied to the defendant for a loan upon the real estate of $6,000, that he finally was allowed a loan of $5,500, that the defendant consented to accept the verification of the title by the owner's conveyancer, who reported that it was subject to two mortgages, the one held by the trustee being the first; that thereupon the defendant delivered to the owner's conveyancer a check payable to the conveyancer's order for $5,500, the conveyancer indorsed the check to the trustee, the agent of the owner paid the trustee $450, and the trustee indorsed the note to the defendant without recourse and delivered it to him, and executed and delivered to the defendant, without having procured any order from the Probate Court, the assignment of the note and mortgage in question and afterwards misappropriated the $5,950 received by him; that, at the time of the passing of papers, the defendant received no note or written acknowledgment of a debt from the owner, but that afterwards the owner signed and gave to the defendant a receipt for the $5,500 paid by it and an extension of the mortgage, which contained an agreement by him to pay the mortgage debt at the end of the extended period and the interest thereon meanwhile; that the entries on the books of the defendant purported to show a loan to the owner. The single justice found as a fact that the defendant attempted to purchase the note and mortgage from the trustee, and, since the trustee had no power to sell it, made a decree for the plaintiff. The defendant appealed, and, on consideration of all the evidence, which was reported by a commissioner, it was *held*, that the transaction was not a sale of the mortgage to the defendant, but that in effect the trustee merely received from the owner payment of the mortgage debt, which was within his power.

BILL IN EQUITY, filed in the Supreme Judicial Court for the county of Suffolk July 26, 1907, by the trustee under the will of

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Francis W. Sayles, seeking to set aside a sale and conveyance of a note and mortgage by the plaintiff's predecessor as trustee to the defendant.

There was a hearing before *Sheldon*, J. The plaintiff's immediate predecessor as trustee was Charles F. Berry. The provisions of the will relating to the powers of the trustee authorized him merely to "stand possessed" of the trust fund, and to "pay over the income and produce" to the beneficiaries.

At the hearing, the plaintiff read interrogatories directed by him to the president of the defendant, and the answers thereto, from which it appeared that Berry, as trustee, had indorsed the note in question without recourse to the defendant and assigned to it the note and mortgage. One of the indorsements on the note was "1903 Mch. 31. Five hundred dollars paid on account of principal." In answer to one of the interrogatories, the defendant's president stated "That he does not know from whom the note was obtained, but that it was obtained on March 31, 1903."

Berry, called by the plaintiff, stated that he had agreed with Harry Friedberg, the authorized agent of the owner of the equity of redemption, that, if he would procure funds and pay off the mortgage, he would allow him $50, that he received on March 31, 1903, $450 on account of the principal of the note from the owner of the equity of redemption of the property described in the mortgage; that, at the time when he delivered the assignment of the mortgage to the defendant, he received "in payment for the assignment" a check of the defendant for $5,500 payable to the order of Kern and McLoud, and indorsed by them to him as trustee, which he deposited in his general account as trustee, and the proceeds of which he misappropriated.

Joseph Balch, director of the real estate department of the defendant, testified in substance that in March, 1903, he talked with Harry Friedberg, the authorized agent of Julia Friedberg, with regard to her procuring a loan upon the property in question, and, after several conversations, the witness told him he "would make this loan on a basis of $5,500." Friedberg asked him if he "would take" the report of Kern and McLoud, conveyancers, and the witness said he would. The name of Berry was not brought into the conversation, nor did the witness, to his

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knowledge, have any correspondence or communication with Berry about the matter until after the agreement for the loan was made. "When we came to passing the papers, I had some conversation with Mr. Berry; whether it was at his office or only in the registry of deeds on the day of passing the papers, I could not say for certain, but not until the end of the transaction." At the time of the passing of the papers, the witness delivered the check as to which Berry had testified either to Kern and McLoud or to the Friedbergs, he could not be certain which. The witness did not know whether or not Berry was at the registry of deeds at the time the papers were passed. On April 1, 1903, the day after the passing of papers, the witness received from Harry Friedberg an extension of the mortgage in question, signed by Julia Friedberg, and wrote to him enclosing a blank cash voucher or receipt for $5,500 for Mrs. Friedberg to sign, which subsequently was signed and returned to him. The defendant did not employ Kern and McLoud to look up the title for it, but acquiesced in the request of Friedberg that they pass on the title. The witness knew that Berry held the mortgage as trustee. In response to a question by the defendant's counsel, the witness stated that he did not at any time make any agreement with Berry as to a purchase of the mortgage from him.

Other witnesses for the defendant testified to the effect that the preliminary negotiations with Friedberg were for a loan to Julia Friedberg by the company, and that the transaction was so treated on its books.

Francis P. Sears, who at the time of the transactions in question was treasurer of the defendant, testified from the books of the defendant in part as follows:

"Q. Will you turn to the cash book of March 31, 1903, and tell me whether it shows any money paid out either to Mr. Friedberg or to Mr. Berry? A. March 31, 1903, Julia Friedberg, $5,500. — Q. Does your cash book show at any time any money paid out to Mr. Berry? A. No. — Q. What was that $5,500 paid out for? A. For a mortgage.

"The Presiding Justice: If it was the date of this mortgage, I would infer that, unless there was evidence to the contrary. Of course I do not say I shall be satisfied that this

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money was paid to Julia Friedberg, because it certainly was not."

"Q. Have you got the account of Julia Friedberg? A. Yes. 'No. 7. Name, Julia Friedberg; address, 108 East Newton St.; promissory note, Aug. F. Arnold; date, Sept. 22, 1894; amount, $5,500; mortgage matures March 31, 1908; interest, rate 5 per cent, payable March 31 and Sept. 30. . . . Mortgage recorded Suffolk deeds, Book 22, 2895, Arnold to Balch; mortgage assigned, Suffolk deeds, 2887, 544; Berry, successor to Balch; mortgage extended, Suffolk deeds , ; successor, Columbian.'"

The witness stated that he did not know what "successor, Columbian" meant, he did not write those two words. It was two or three days before the passing of papers that he first learned that the mortgage was an old one and that the defendant was taking an assignment of a mortgage from Berry, and the entries on the books were made by him after that. The company regarded itself as the absolute owner of the mortgage. At the time the papers were passed the company did not have anything from Mrs. Friedberg to show that any loan had been made to her. The receipt and the extension agreement signed by her were procured afterwards.*

"Q. (by defendant's counsel). Then, summing it all up, all that you did was this: that you supposed that you were loaning Mrs. Friedberg $5,500, and made that entry upon the books at the time, and then, as a short cut, you simply took an assignment of the mortgage from Mr. Berry after the money had been paid to him? A. Yes."

Percy E. Walbridge, associated with the firm of Kern and McLoud, testified that he acted for the firm in the transactions in question. The charge in their books was to Julia Friedberg. They found the title to be in her subject to the mortgage in question, which was a first mortgage, and to a second mortgage given to one Atherton. . . . "I suppose I must have reported to [the defendant] the condition of the title . . . before it was

* This extension was in evidence and contained an agreement by Julia Friedberg to pay the mortgage debt at the termination of the extended period, and the interest thereon in the meantime.

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passed." In receiving the check, which he indorsed to Berry, "I was acting in passing the papers for a loan from the Columbian Company to Julia Friedberg. I supposed I was acting for both of them; I was acting to give a certificate of title to the [defendant], or acting for them as to whether the title was good, or for them to accept my statement as to whether the title was good."

"Q. For whom were Kern and McLoud acting? A. Well, I don't know; I suppose they were acting for Friedberg. The whole transaction showed that the Columbian Life Insurance Company were loaning money to Julia Friedberg. In my judgment the reason that mortgage was assigned was that there was a second mortgage there which could not be discharged.

"Q. There was a second mortgage, was there? A. Yes, there was a second mortgage on there to William H. Atherton.

"Q. You say the money was loaned to Julia Friedberg: then, when you found a second mortgage, instead of having that discharged and a new mortgage made, they took an extension? A. An extension was taken which bound Julia Friedberg to pay the debt and relieve making a new loan.

"Q. Did you have anything to do with Berry in the matter? A. I did not know anything about Berry except that he was willing to assign rather than to discharge." The witness also stated that he prepared the assignment of the mortgage, and took Berry's acknowledgment thereof.

Berry, recalled by the defendant, stated that he had no memory as to any conversation with any one representing the defendant before the execution and delivery of the assignment of the mortgage, that all he remembered was that, on the day of the passing of the papers, he "was asked at the last moment by somebody if he was willing to assign the mortgage, but he could not remember who asked him."

The foregoing is in substance all the testimony introduced at the hearing with regard to the nature of the transaction which took place when the assignment of the mortgage was executed and delivered by Berry. At the close of the testimony the single justice made the following oral statement:

"I think the averments of the bill are good. Whatever was originally the intention of the insurance company, I cannot

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help finding that it consented finally to take — it was satisfied to take, and it did take — this mortgage with an indorsement of $500 upon it as an investment of its money. It consented to take this assignment from Berry. It then, whatever its prior intention had been, made up its mind to buy this from Berry. The fact that it continued to make the entries on its books in the same way as it had been in the habit of making them before that time does not seem to me of any very great importance.

"I rule, as a matter of law, that upon my findings of fact there was no right of the insurance company to be subrogated to the benefit of this security as against the mortgagee, and I find that I am not called upon here to determine whether it had any such right as against the mortgagor. I think that the insurance company must be regarded here as having purchased this note and mortgage from Berry, the former trustee, who had no right to make an assignment of the mortgage, although he would have had the right to receive payment of the debt and discharge the security; and the insurance company must be dealt with as having knowledge of that fact. He had obtained no authority through the Probate Court to make any disposition of this security; he had none by the terms of the trust. He acted wrongly in making the assignment. The insurance company had itself examined the title through a person upon whom it was content to rely for that purpose, and must be regarded as having knowledge of the fact he had no right to do it. The plaintiff may have a decree requiring the insurance company to assign and deliver, — to assign the mortgage, to deliver the mortgage to him, and to indorse the note and deliver the note to him, and for the amount of principal and interest that has been received upon the note by the insurance company since the assignment to it."

A decree accordingly was entered for the plaintiff, and the defendant appealed.

J. M. Hallowell, (*M. M. Horblit* with him,) for the defendant.

C. L. Bremer, *pro se.*

BRALEY, J. In *Bremer* v. *Hadley*, 196 Mass. 217, the authority of the trustee either to sell the property held in trust under the will of Francis W. Sayles, or to change the investments, was carefully considered. Because of the language used by the tes-

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tator, it was held that the trustee was not empowered to convert the estate from one form of security into another, unless authorized by decree under the provisions of R. L. c. 147, § 15, as amended by the St. of 1907, c. 262, § 1. The plaintiff claims that the present case is governed by that decision.

Before deciding the question, it becomes requisite to ascertain the substantially undisputed facts involved in the transaction which the bill asks to have set aside. The plaintiff's predecessor, Berry, found among the investments made by a former trustee a promissory note secured by a mortgage of real estate given by one Arnold. When Berry succeeded to the trusteeship, the note was overdue, but the interest continued to be paid regularly for nearly six years after maturity by Julia Friedberg, the surviving owner of the equity of redemption, who with her husband had acquired title as tenant by the entirety shortly after the mortgage was given. The trustee having demanded payment of the principal, she applied to the defendant for a loan to enable her to take up the mortgage. But, while the application was granted, an examination of the title disclosed that a second mortgage had been given, which was still outstanding. To avoid any question as to priority of title which might arise if the first mortgage was discharged, when the parties met to pass the papers, the trustee without any previous arrangement between himself and the defendant, upon receiving payment, executed and delivered an assignment, instead of a discharge, accompanied with a transfer of the note without recourse. The mortgage thereupon was extended for a period of five years, under an agreement by which Mrs. Friedberg became personally bound to the defendant to pay the debt. During the negotiations, there does not appear to have been any proposition from either the trustee or the company, that he should sell and it should buy the mortgage, but the object which the borrower and lender mutually sought to accomplish was this: An amount sufficient to take up the outstanding mortgage after the partial payment had been made was to be lent by the defendant upon the distinct understanding that the loan was to be secured by a mortgage upon her real estate. When, however, the condition of the title had been ascertained, as a matter of precaution on the part of counsel entrusted with the conveyancing, and under their advice, the old mortgage was

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assigned with an agreement of extension, instead of being discharged, and a new mortgage taken. It is evident that the trustee was not in the market seeking for an opportunity to change an investment, but was insisting upon the payment of a debt long overdue. If it turned out that, to raise the money his debtor must remortgage the property, and the defendant was willing to accept this security and make the necessary advancement, the transaction still remained essentially one where an old debt was liquidated with funds obtained from a new loan. The note, to which the mortgage was merely accessory, having matured, it became convertible into money according to its tenor, and, if not paid, suit could have been brought or the mortgage could have been foreclosed, as the duty devolved upon the trustee to protect the estate from loss. If, to obviate this expense and the chance of a failure to collect, or to realize a sum sufficient to pay the debt with the costs of foreclosure, he had received the principal in bank notes, and discharged, or, if equally advantageous to the trust, assigned the mortgage, it would be going far to say that the payment or the transfer was a nullity because the trustee was not authorized to convert the indebtedness into money. In its administration there undoubtedly must be a strict conformity with the directions found in a testamentary trust. But the words of the testator, that the trustee shall "stand and be possessed" of the trust estate, and "pay all the net income and produce of the same" to the beneficiaries for life, should not be enlarged beyond the construction put upon them in *Bremer* v. *Hadley*, *ubi supra*. It may be reasonably supposed that, if in the administration of the trust it became desirable or essential to close an investment, which by its terms had become payable, the testator did not intend that the trustee should be prohibited from receiving the proceeds and giving an acquittance in settlement, without first obtaining the sanction of the court. The general directions which he gave carry with them, by implication, the employment by the trustee of all reasonable and proper means by which they could be made effective, not only to preserve the estate as he left it, but to produce an income for the support of the beneficiaries for life. The acts of Berry, being commensurate with the purposes of the trust, were within his fiduciary authority, and the defendant acquired an indefeasible

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title to the note and accompanying mortgage. *Goodrich* v. *Proctor*, 1 Gray, 567, 570. *Manahan* v. *Varnum*, 11 Gray, 405.

We are of opinion that, upon the evidence, for the reasons stated, the decree for the plaintiff must be reversed, and a decree entered dismissing the bill with costs. *Poland* v. *Beal*, 192 Mass. 559, 561. *Harvey-Watts Co.* v. *Worcester Umbrella Co.* 193 Mass. 138, 148.

Ordered accordingly.

ARTHUR E. CHILDS & others *vs.* ARTHUR W. KREY & another.

Suffolk. March 16, 1908. — June 16, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Gas and Electric Light Commissioners. Statute. Fraud. Contract, Performance and breach, Construction. *Interest.*

Under R. L. c. 109, § 26, providing that if, when the board of gas and electric light commissioners approves of an issue of new stock or bonds by a gas or electric light company, it determines that the fair structural value of the plant is less than its outstanding stock or debt, it may require the impairment of capital to be made good, that board is not given the power to require such impairment to be made good except as it makes such requirement a condition under which the new stock or bonds may be issued.

An electric light company at a stockholders' meeting voted to increase its capital stock. Upon application being made to the board of gas and electric light commissioners under R. L. c. 109, § 24, for its approval of the issue of new stock, that board approved of the issue and, under § 26, ordered that, the fair structural value of the plant appearing to be less than the company's outstanding stock and debt, the company should not declare nor pay any dividend upon its capital stock theretofore issued until at least $3,500 of the indebtedness of the company was cancelled out of its income. The order was not entered on the records of the corporation as required by § 24, the new stock never was issued and six semiannual dividends thereafter were paid on its stock theretofore issued by the corporation, and were reported by it to the board, who made no objection thereto. Thereafter an agent of persons who desired to purchase the capital stock and assets of the corporation from one who held all its capital stock, observing on the record book of the corporation the vote to increase its stock, asked the prospective seller about it, and was told that nothing had been done under the vote, but that the project had been given up; and thereupon the purchase was made. Subsequently the purchasers sought to have deducted from the amount agreed to be paid by them to the seller a sum equal to all of the dividends paid after the order of the board of gas and electric light commissioners was made, contending that the payments were made in violation of the order, and that the seller had made false representations as to the dividends. *Held*, that, the project as to the issue of additional stock having been abandoned, the order as to

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payment of dividends was inoperative, the seller's statement was accurate, and the deduction sought should not be made.

As a part of a contract for the sale of all the capital stock of a corporation, the seller "guaranteed" that the liabilities of the company did not exceed by more than $100 a certain amount. In a suit to recover the amount of the purchase price, it appeared that the liabilities of the corporation were $523 more than the sum mentioned in the contract of sale, and the defendant contended that such sum should be deducted from the purchase price. *Held*, that $423 only should be deducted under the terms of the contract.

If in a suit for an accounting the plaintiff admits that he had agreed to pay the defendant a liquidated amount on a certain date, but seeks to have certain unliquidated sums deducted therefrom, and findings are made that the plaintiff is entitled to certain deductions, interest should be charged against the plaintiff on the liquidated debt from the date when he agreed to pay it, and interest from the date of the bringing of the suit should be allowed him on the amount of deduction awarded him.

BILL IN EQUITY, filed in the Supreme Judicial Court for the county of Suffolk July 15, 1907, as stated in the opinion.

The case was referred to a master, who filed a report to which the plaintiffs excepted. The exceptions were heard before *Morton*, J., who reserved the case for consideration by the full court.

H. W. Ogden, for the plaintiffs.

M. S. Holbrook, for the defendant Krey.

LORING, J. This is a bill in equity reserved for our consideration on the bill, answers, master's report and exceptions thereto.

The controversy grows out of a contract between the plaintiffs and the defendant Krey, dated January 31, 1907, whereby Krey sold to the plaintiffs all the stock of the Ayer Electric Light Company (amounting to $10,000) together with notes of the company held by Krey to the amount of $13,000. By article 3 of that contract Krey "guarantees that the liabilities of said Ayer Electric Light Company do not exceed by more than $100 the amount set forth in the statement of liabilities hereto attached," and by article 4 Krey further guarantees "that the amount of the gross income and the amount of bills receivable are as represented by said attached statement." Article 5 provides for the payment of $18,750, and the provision as to that is in substance as follows: The stock and notes (properly indorsed) are to be delivered to the plaintiffs "for the purposes of this agreement"; "the property" is to be examined by the plaintiffs and accepted, if accepted, by February 15, 1907; upon delivery of the stock and

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notes and acceptance of the property, $6,250 in cash is to be paid; another $6,250 on April 15, 1907; and the final payment of $6,250 on July 15, 1907. Article 6 provides that, on the plaintiffs' receiving the stock and notes, they are to take out new certificates of stock and deliver the new certificates and the notes (duly indorsed) to the other defendant here, the State Street Trust Company. Article 7 provides for a change in the personnel of the board of directors "upon receipt of the first payment." Article 8 provides that the State Street Trust Company shall hold the stock and notes "as collateral security for the full and complete performance of the obligations of this agreement," and the other articles of the agreement (namely, 9 and 10) deal with details not important in connection with the matters now in question.

The plaintiffs accepted the property, the first instalment was paid, the stock and notes were duly delivered and transferred to the plaintiffs and by them delivered, duly indorsed, to the State Street Trust Company, and the plaintiffs entered into and have since continued in control of the company. The second instalment was also paid when due.

On the day on which the third and last instalment was due, the plaintiffs filed this bill setting forth the above facts and alleging (1) that the liabilities were greater than the amount set forth in the statement by $466.44; (2) that the bills receivable were less than the amount set forth by $227.75; and (3) that the Ayer Electric Light Company had been ordered by the board of gas and electric light commissioners, on June 12, 1908, not to declare or pay any further dividends on its capital stock till at least $3,500 of its promissory notes then outstanding had been paid, and that, in violation of that order, dividends to the amount of $2,400 had been subsequently paid. Further, that the defendant Krey had falsely represented in effect that there was no such order in existence, and thereby became bound to repay to the company the $2,400. The plaintiff alleged in the bill of complaint that the plaintiffs had a right to offset the $466.44, $227.75, and the $2,400; he also alleged threats by Krey to have the stock sold if the instalment due on July 15 was not paid, and asked that the amount equitably due might be ascertained.

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The master reported that the liabilities exceeded those stated by $523.70, and that there were four items for which the plaintiffs were entitled to a credit amounting in all to $216.81. He disallowed eight other items claimed by the plaintiffs and found that nothing was due on account of the order of the board of electric light commissioners and the representations of the defendant Krey in that connection. Under the terms of Krey's guarantee that the liabilities did not exceed the amount stated "by more than one hundred dollars," the master allowed as a set-off in that connection $423.70; he also allowed the other four items amounting to $216.81, in all, $640.51. He deducted this from the $6,250 due on July 15, 1907, and allowed interest on the balance from that day.

The plaintiffs have waived their exceptions to the finding of the master as to the eight items mentioned above. They now insist upon their exceptions to the finding as to the restitution of the $2,400, to the deduction of $100 from the $523.70, and to the ruling of the master as to interest.

1. The facts as to the $2,400 of dividends are as follows:

On February 20, 1903, the stockholders of the Ayer Electric Light Company voted "to issue $20,000 additional capital stock, the proceeds to be applied to the payment of the company's net indebtedness, and to the purchase of a new generator, engine, boiler, and the necessary fittings." On an application to the board of gas and electric light commissioners for leave to increase the stock as voted, that board made an order on June 12, 1903. That order begins by a finding that the indebtedness of the company is $8,500, and the cost of the new construction $15,000. It then approves the issue of two hundred shares, the proceeds of fifty shares to be applied "to the payment of an equal amount of the promissory notes of the company now outstanding," and the proceeds of the other one hundred and fifty shares to the new construction. The order then fixes at par the price at which the new shares are to be issued, and ends with these words: "And it appearing that the fair structural value of the plant of said company is less than its outstanding stock and debt, Ordered further, That said Ayer Electric Light Company shall not declare nor pay any dividend upon its capital stock heretofore issued until at least $8,500 of the company's

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promissory notes now outstanding shall have been paid and cancelled out of income or until otherwise ordered by the board."

This order was not entered on the records of the corporation as required by R. L. c. 109, § 24; the company took no steps to issue the new shares, and continued to pay dividends on its old stock.

An agent of the plaintiffs in making the examination of the property specified in the contract found on the stockholders' records a record of the vote to increase the capital stock, and "asked Krey about the vote. Krey told him that nothing had been done under it, and that the project of rebuilding and adding to the plant had been given up."

The plaintiffs' contention is that the order of the board made on June 12, 1903, not to pay further dividends was an independent order, and that the company is now bound to restore to its treasury the $2,400 so paid out. Further that Krey, having made a false representation as to the matter, is under an obligation to make his representation good.

We are of opinion however that Mr. Krey's statement was accurately true.

The only power which the board of gas and electric light commissioners had in 1903 to direct an electric light company to make good an impairment in its capital stock was that given by R. L. c. 109, § 26.

R. L. c. 109, § 26, does not give the board power to enter an independent order directing an impairment of capital to be made good. The only power given in this connection to the board is to require an impairment of capital to be made good as part of an order approving an issue of new stock or bonds.

The section in terms provides: "If where the board of gas and electric light commissioners approves an issue of new stock or bonds," it determines that the fair structural value of the plant is less than its outstanding stock and debt, it may require the impairment of capital to be made good. That does not give the board power to order an impairment of capital made good apart from an order approving an issue of new stock or bonds. The object of the act manifestly was to enable the board to see to it that the old stock, for example, was worth par before new stock to be issued at par was approved.

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This construction of the statute has been adopted by the board in the case of the electric light company now in question. The order for the issue of new stock was made on June 12, 1908. On the thirtieth day of the same month a dividend of one and one half per cent was declared and paid, and dividends of three per cent were declared and paid in December of that year, in June, 1904, and in January and June, 1905, while in February and June, 1906, and in January, 1907, dividends of three and one half per cent were declared and paid. The company reported to the board each and all of these dividends. No objection to this course of business was made by the board, manifestly because it considered that the order (as it was and had to be) was a part of the approval of the issue of new stock, and that the project of issuing new stock had been abandoned by the company.

Not only did the electric light company pay these dividends, but as we have said it did not enter the order upon its records, as it was bound to do if it did not abandon the project. See R. L. c. 109, § 24. We are of opinion that before February 4, 1907, when or about when the defendant Krey told the plaintiffs that the project "had been given up," it had been abandoned, and that statement was accurately true.

It follows that the tenth, eleventh, twelfth and thirteenth exceptions to the master's report must be overruled.

2. The guarantee given by the defendant Krey was not a guarantee that the liabilities were correctly stated in case they did not exceed by more than $100 the amount set forth in the statement. It was a guarantee "that the liabilities of said Ayer Electric Light Company do not exceed by more than $100 the amount set forth." The ruling of the master was correct that the defendant owes the plaintiffs on this guarantee $423.70, being $523.70 (the amount of the excess of liabilities over that set forth) less $100; and the first exception to the master's report must be overruled.

3. The only other exception not waived by the plaintiff is that to the ruling of the master "that the defendant Krey is entitled to interest on the balance due him from the plaintiffs on July 15, 1907." In our opinion that exception also must be overruled.

The plaintiffs' contention is that the interest in the case at

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bar should be dealt with as in case of an unliquidated open account, and that under that rule no interest should be allowed until the "balance has been determined by this proceeding."

We think that they are wrong in both these contentions.

The amount due from the plaintiffs was a liquidated amount due at a time fixed, namely $6,250, due July 15, 1907. What the plaintiffs sought to do by bringing the bill in equity now before us was to set off against this liquidated claim the unliquidated sums due them on cross claims. In such a case interest is due from the plaintiff on the liquidated sum from the date at which it was payable, and interest is to be paid by the defendant on the cross claims from the date of the writ. The matter of interest due on the liquidated claim in such a case is not fixed by the rule in case of unliquidated claims.

But the plaintiffs are wrong as to what the rule is as to interest in case of unliquidated claims. It is not (as they assume) that interest is allowed only from the date when the balance due is ascertained in the proceeding. Interest in such cases is allowed from the date of the writ starting those proceedings. This is laid down in the cases cited by the plaintiffs' counsel *Palmer* v. *Stockwell*, 9 Gray, 237. *Stimpson* v. *Green*, 13 Allen. 326. *Freeman* v. *Freeman*, 142 Mass. 98, 105.

It happens that the date of the bill in equity and the date when the $6,250 was due are the same, namely, July 15, 1907.

The tenth exception to the master's report must be overruled.

It follows that a decree should be entered overruling all the exceptions taken to the master's report and directing the defendant the State Street Trust Company to deliver to the plaintiffs the stocks and bonds now held by it upon the payment by the plaintiffs to the defendant Krey of $5,609.49 with interest at six per cent from July 15, 1907, to the date of payment, the State Street Trust Company to recover its taxable costs from the plaintiffs. No costs should be allowed the plaintiffs or the defendant Krey.

So ordered.

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ARCHIBALD M. HOWE, administrator, *vs.* LAURA T. RIPKA & another.

Suffolk. March 16, 1908. — June 16, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Gift.

If the owner of negotiable coupon bonds about four months before his death places them, together with all the coupons not then due, in the custody of his sister with the intention that they shall remain his property during his life and on his death shall become the property of his sister, and tells her that this is his intention and she accepts the custody of the bonds on those terms, and thereafter the coupons are collected by the owner until his death as his property, a part of them being cut off and brought to him by his sister at his request, there is no gift of the bonds, and on the death of the owner they pass to the administrator of his estate.

KNOWLTON, C. J. This is a bill in equity, brought by the administrator of the estate of Joseph F. Greenough, late of Boston, deceased, to recover possession of coupon bonds issued by numerous corporations, of the face value of $325,000. It is admitted that these bonds were formerly the property of the plaintiff's intestate, and the question at issue is whether the defendant, Mrs. Ripka, who will hereinafter be called the defendant, acquired a title to them from the intestate, who was her brother, by an absolute gift from him in his lifetime. The single justice who heard the evidence made a decree for the plaintiff, and the defendant appealed.

There are no questions of law in dispute. It is agreed on both sides that, inasmuch as the evidence was for the most part given orally and the justice saw and heard the witnesses, his findings will not be set aside unless they are plainly wrong. It is agreed that, unless the alleged gift was perfected so that it took effect and became absolute in the lifetime of the intestate, it cannot avail the defendant. There was no testimony warranting a finding that there was a conveyance in trust, and questions as to the validity of a power of revocation reserved in an instrument or contract creating a trust are immaterial. Preliminary matters were undisputed, and in addition the single justice found facts as follows:

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"I further find as a fact that, some four months before his death, Mr. Greenough placed these bonds in the custody of the defendant, Laura T. Ripka, together with all the coupons thereto belonging not then due, with a possible exception hereinafter mentioned; that when these bonds and coupons were placed by Mr. Greenough in the custody of Mrs. Ripka it was his intention that they should be his during his life, and that on his death they should become the property of Mrs. Ripka, and that he told her that that was his intention, and that she accepted the custody of them on those terms.

"I further find as a fact that all the coupons originally attached to said bonds and falling due after the day when the bonds were placed in the custody of Mrs. Ripka were collected by Mr. Greenough as his property, including some twelve to twenty coupons (precisely how many was left indefinite by the evidence), which were due March 1, 1906.

"I further find as a fact that these twelve to twenty coupons, due March 1, 1906, were not cut off from the bonds to which they were originally attached at the date when Mr. Greenough placed the bonds and coupons in the custody of Mrs. Ripka. I further find as a fact that, on or about February 18, 1906, Mr. Greenough, in substance, asked Mrs. Ripka to go to the Union Safe Deposit vaults where the bonds and coupons then were and bring these twelve to twenty coupons to him, that he might deposit them for collection as his property, and that she did as he requested her to do, and that thereafter he collected these coupons as his property.

"I did not find it necessary to decide whether the other coupons, originally attached to said bonds and falling due before the date of Mr. Greenough's death but after the date on which the bonds and coupons were placed in the custody of Mrs. Ripka, had been cut off then or were cut off afterwards."

The only question that we have to consider is whether the justice should have found that there was an absolute gift, that took effect immediately, as the defendant contends, so that the intestate no longer had any right or interest in the property, or whether his finding on this point was correct.

The testimony as to the gift came from the defendant alone. A claim such as she makes in this case ought to be examined

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with very close scrutiny. The effect of a strong interest upon the accuracy of the testimony of witnesses of the most honest and truthful intentions is familiar to every one who has had experience in the courts. In the effort to recall conversations or other occurrences by the aid of an imperfect memory, the influence of continuous strong feeling is often such as to produce mental pictures with forms distorted or colors changed. Of course, if a witness is not sustained by high moral principle the temptation to prevaricate may be overpowering. For these reasons, long after parties and other interested witnesses were allowed to testify in ordinary cases under our statutes, in a case like the present, where the executor or administrator was a party, or one of the parties to the contract in issue and on trial was dead, the other party was not permitted to testify. Gen. Sts. c. 131, § 14. If this trial had occurred before the passage of the St. 1870, c. 393, the defendant could not have been heard at all as a witness.

The plaintiff testified that, on the first occasion when he had a conversation with the defendant in regard to the bonds, she stated "that her brother had said to her that when he was gone, or when he had died, they would be hers and she could do as she pleased with them." She testified that the gift was made to her on November 6, 1905. Her brother died on March 20, 1906. It appeared that coupons cut from these bonds were deposited by the intestate with Kidder, Peabody and Company on November 6, November 25 and December 9, 1905, and on January 23 and February 13, 1906. These coupons were collected and the proceeds placed to his credit. Those deposited on each of these dates became due on the first day of the following month. According to the testimony of the defendant, the bonds were removed from the box of the intestate, in the vaults of a safe deposit company, to another box in the vaults of another safe deposit company. It appeared that this box was taken by her in her own name, in the presence of her brother, and that he was made her deputy, with authority to open it in her absence. After the death of the intestate she was present with the plaintiff and others when the contents of his box in the first safe deposit company were examined, and surprise was expressed by persons interested that no bonds were found. At that time, and

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at different interviews which she had with the plaintiff about her brother's property, she said nothing to indicate that any bonds had been given to her, or that she had knowledge of any bonds that he had owned, and it was not until the administrator told her of the discovery that her brother was depositing coupons from bonds with Kidder, Peabody and Company up to very nearly the time of his death, and asked her directly about them, that she gave any information on the subject.

She testified that her brother never gave her any information as to the magnitude of the gift, or the number or amount of the bonds, and she never investigated nor had any knowledge on the subject until after his death, except that she knew something about the bonds from having sometimes assisted him in cutting off coupons before the gift was made. She also testified that, on the day when the gift was made, he said nothing to her about making the gift or removing the bonds until after he had gone to the safe deposit company, whither she accompanied him in a carriage, and that the bonds were brought out and put into the carriage before a word had been spoken in regard to a gift, or to where they were to be put. It also appeared that, in February, 1906, he bought other bonds which she said he gave her, and which she put in the box with the others.

She testified in explanation of these matters, saying that when he gave her the bonds he told her he had cut off future coupons such as he chose, and that she afterwards cut off the coupons that became due in March and gave them to him as a present. She also testified that he told her of his intention to give her the bonds a considerable time before the gift was made.

There was testimony as to her having caused a will to be made for him, by his direction, a few days before his death, which will was very favorable to her in its provisions, but contained no mention of several others of his heirs at law with whom he was on friendly terms. She testified that she sent for persons to be present as attesting witnesses at the execution of this will, but after their arrival he refused to execute it.

It is unnecessary to review the evidence at length. After a careful examination of the voluminous testimony, giving due weight to the explanations and circumstances favorable to the defendant's contention, we are brought not only to the negative

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conclusion that the decision of the single justice does not appear to be wrong, but also to a satisfactory affirmative opinion that the printed evidence shows it to be right.

Decree affirmed.

H. Parker, (*L. A. Frothingham & H. H. Fuller* with him,) for the plaintiff.

H. E. Bolles & G. Cunningham, for the defendants.

WILLIAM O. FALARDEAU *vs.* C. EVERETT WASHBURN.

Suffolk. March 17, 1908. — June 16, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Equity Jurisdiction. Attorney at Law. Lien.

A client, for whom an attorney at law has recovered money which he retains in his hands, may maintain a suit in equity against the attorney to enjoin him from using the money in paying more than the plaintiff thinks is due in settling physicians' bills against the plaintiff.

In a suit in equity against an attorney at law, who has recovered money for the plaintiff which he retains in his hands, to enjoin him from using the money in paying more than the plaintiff thinks is due in settling physicians' bills against the plaintiff, if it appears that the defendant was given an opportunity by the judge who heard the case to have the physicians summoned into court in order that he might establish the amount of his lien on the money in his hands for personal liability incurred for their bills, and did not elect to have them made parties, he cannot rely on such lien in defense, as he has no right to retain the plaintiff's money in his hands indefinitely for the purpose of settling these bills, and has lost his lien through his own fault in not taking the proper steps to enforce it.

LORING, J. This suit comes before us on two appeals, one from an order overruling a demurrer to the bill, the other from a final decree.

It is alleged in the bill that the defendant was retained by the plaintiff in an action to recover for personal injuries suffered by him; that the action resulted in a judgment for the plaintiff, on which the defendant has received more than $1,000; that the plaintiff has asked for an accounting and payment and the defendant "refuses to pay over any money or properly to account for the same." Then follows this allegation: "Said

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Washburn employed doctors to testify at the trial of said cause, whose charges and claims for services are excessive, which charges and claims said Washburn threatens to pay." As we have said, a demurrer to this bill was overruled and an appeal taken.

In overruling the demurrer the judge stated his reasons to be: "I am of opinion that the bill states a cause for equitable relief and therefore overrule the demurrer. It is not to be understood, however, that the court may not as a matter of discretion order other parties to be joined, if it is made to appear upon motion that the defendant has incurred liabilities in the plaintiff's behalf and the amount of such liabilities is disputed."

No motion was made by the defendant for the joinder of the doctor whose charges he threatened to pay out of the sum received by him for the plaintiff.

The case then came on for hearing on the merits.

In the course of that hearing the defendant asked the plaintiff on cross-examination how many days the doctors were in attendance. To this the plaintiff objected on the ground that the amount due them was not in issue; — stating that when the "demurrer was overruled leave was given to join the doctors as parties," and that the defendant had not done so. A long colloquy ensued, and the whole matter was disposed of by the judge in these words: "It seems to me, inasmuch as the defendant has not made any motion, there is no reason the thing should not go on. The suggestion here apparently is, it should be the motion of the defendant. Evidently the statement is, if it is made to appear upon motion that the defendant has incurred liabilities on the plaintiff's behalf, of course the defendant would be the one who would ask to have the other parties brought in. The plaintiff does not care whether the defendant has incurred liabilities or not, but if the situation is such that the defendant finds the money going from him, and that he has incurred liabilities, then he may have them brought in, so that they shall be settled with, here in court. That would be my interpretation upon this memorandum here. Therefore I see no reason why we should not go on with the case at present."

In a report of the material facts found by the judge, made in pursuance of a request under R. L. c. 159, § 28, it is stated

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that: "Each party disclaimed any desire to have the physicians made parties to the bill."

In deciding the appeal from the order overruling the demurrer we do not find it necessary to pass upon the right of a client to maintain a bill in equity against his attorney in all cases. See in this connection Langdell's Brief Survey of Equity Jurisdiction, 98; *Powers* v. *Cray*, 7 Ga. 206; *Badger* v. *McNamara*, 123 Mass. 117; *Campbell* v. *Cook*, 193 Mass. 251. *King* v. *Rossett*, 2 Y. & J. 33; *Navulshaw* v. *Brownrigg*, 1 Sim. (N. S.) 573; 2 DeG., M. & G. 441; *Moxon* v. *Bright*, L. R. 4 Ch. 292.

It was not suggested in the bill that any one but the plaintiff was liable for these doctors' bills. That was set up for the first time in the answer. The case stated in the bill is that of an attorney undertaking against his client's instructions to use his client's money in paying more than the client thinks is due on a debt due from the client. The client under those circumstances is entitled in our opinion to go into equity and have the attorney enjoined.

The defendant complains that he is personally liable for the bills due the doctors, and that he has a lien on the moneys in his hands for the liability so incurred. The answer to that is that he was given an opportunity, when the case was tried on the merits, to have the doctors summoned in and the amount of his lien established although he had not set it up in his answer. And he did not elect to do so. The defendant had no right to retain the money in his hands indefinitely to secure himself against loss on these debts. The loss of his lien was through the defendant's own fault in not taking the proper steps to enforce it.

Decree for plaintiff affirmed.

The case was submitted on briefs.

C. E. Washburn, pro se.

R. Gallagher & W. P. Fowler, for the plaintiff.

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JOSEPH W. ALLEN & others *vs.* GEORGE B. WILBUR & another.

Suffolk. March 18, 1908. — June 16, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Evidence, Of notice, Presumptions and burden of proof. *Equity Pleading and Practice*, Master's report.

In a suit in equity which has been referred to a master, where it is material to show that a certain notice was given to a corporation, if the party wishing to prove the notice shows that a letter containing the notice properly addressed to the treasurer of the corporation, who had full charge of its business, was delivered by a messenger at the office of the treasurer which also was the office of the corporation, and that in the ordinary course of business he should have received it, and the treasurer of the corporation testifies that he never received the letter and did not know of its existence until a copy was shown to him while he was testifying, this warrants a finding by the master that the notice was given and received, as the master is at liberty to disbelieve the testimony of the treasurer, and the fact that the letter ought to have been received warrants the inference that it was received.

In a suit in equity which has been referred to a master, where the plaintiff to establish his right to relief must show that he furnished certain proof within sixty days after notice in writing had been given by the defendant to a certain corporation, if the defendant at the hearing before the master shows that, more than sixty days before any proof was offered by the plaintiff, such notice was contained in a letter sent by him to the corporation, which ought to have been received by the corporation, warranting the inference that the letter was received, if the master does not state expressly that he has drawn that inference, but makes a special finding that no proof was furnished by the plaintiff until a period of more than sixty days had elapsed after the receipt of the notice, this finding includes the drawing of the inference.

BILL IN EQUITY, filed in the Supreme Judicial Court on November 21, 1904, and amended on December 5, 1906, seeking to enforce the specific performance of an agreement of the defendant in writing under seal dated December 4, 1902, by compelling the delivery to the plaintiffs of certain bonds of the Columbus and Southern Railway Company of Ohio.

The agreement sought to be enforced, among other provisions, contained the following:

"Now Therefore in consideration of the premises and of one dollar and other valuable considerations paid by the John W. Dickinson Company the receipt of which is hereby acknowledged, I, the said George B. Wilbur, do hereby covenant and

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agree with and to said John W. Dickinson Company that if said bonds so deposited shall be returned to me in consequence of default in the payments required to be made to me under the terms of said agreement of September 13, 1902, and if said parties or any of them within sixty days after written notice to said John W. Dickinson Company of such return to me shall make demand upon me in writing and shall also satisfactorily prove that they have advanced any money through said John W. Dickinson or said John W. Dickinson Company to the purchase of said railroad with the understanding that they should be secured by bonds upon said railroad I will deliver to said parties respectively bonds of said railroad at the rate of one bond of the face value of $1,000 for each one thousand dollars so subscribed and actually paid in and used in said undertaking. . . ."

The case was referred to Walter B. Grant, Esquire, as master. His findings and the plaintiffs' objections thereto material to the only questions considered by this court are stated in the opinion.

The case was heard upon the master's report and the plaintiffs and the defendant's exceptions thereto by *Rugg*, J., who made a final decree that the exceptions of each party be overruled and that the master's report be confirmed, and that the bill be dismissed with costs to the defendant. The plaintiffs appealed.

It was conceded that the plaintiffs had not made demand upon the defendant in writing or proved that they had advanced money for the purposes named within sixty days from April 16, 1903, when the letter mentioned in the opinion was written by the defendant to the treasurer of the John W. Dickinson Company, but the plaintiffs contended that this letter never was received by that company and therefore that the notice from which the sixty days were to run had not been given.

The case was submitted on briefs.

W. H. Thorpe, for the plaintiffs.

L. Cushing & H. D. McLellan, for the defendant Wilbur.

LORING, J. It is conceded that the plaintiffs must fail if the notice given by Mr. Wilbur's attorney was in fact received by the John W. Dickinson Company. The notice was addressed to "Mr. John W. Dickinson."

In the body of his report the master states: "The said John

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W. Dickinson testified that he did not receive said letter, and did not know of its existence until a copy thereof was shown to him while testifying before me. The defendant Wilbur offered the letter as a sufficient notice to the John W. Dickinson Company of the return to him of said bonds, if such notice was necessary under the agreement of December 4, 1902. The said John W. Dickinson was on April 16, 1903, the treasurer of said John W. Dickinson Company and had full charge of its business; his office was the office also of the John W. Dickinson Company at No. 87 Milk Street, Boston, Mass. I find that said letter was delivered by messenger at his said office and that in the ordinary course of business he should have received the same."

The master's report however ends with special findings, and among them is this: "I find that the complainants made no demand, and furnished no proof, to said Wilbur as provided in the instrument of December 4, 1902, until a period or [of] more than sixty days had elapsed after the receipt of the said notices as aforesaid."

The plaintiffs' third objection to the master's report is in these words: "The complainants object to the finding that the complainants made no demand, and furnished no proof, to said Wilbur as provided in the instrument of December 4, 1902, until a period of more than sixty days had elapsed after the receipt of the said notices as aforesaid. There is no evidence that the said notice of April 16, 1903, was ever received by the said John W. Dickinson or by the said John W. Dickinson Company."

The plaintiffs' fifth objection is in these words: "The complainants object to the failure of the master to make the third of their requests for rulings. There was no evidence of the receipt of the notice." The third request for ruling referred to is a ruling that the notice to be effective should have been actually received.

The master was at liberty to disbelieve Dickinson's testimony. *Lindenbaum* v. *New York, New Haven, & Hartford Railroad*, 197 Mass. 314.

The fact that the letter ought to have been received by Dickinson warranted the inference that it was received.

Although in the body of the report the master does not state

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that he had drawn that inference, such an inference is included in the special finding stated above. As we have said, there is a special finding that no proof was furnished "until a period of more than sixty days had elapsed after the receipt of said notices." That finding includes the drawing of that inference.

Any doubt as to how the master viewed this is done away with by his letting both findings stand in spite of the third and fifth objections made to it by the plaintiffs.

Decree affirmed.

GEORGE P. BECKFORD *vs.* INHABITANTS OF NEEDHAM.

Norfolk. March 20, 1908. — June 16, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Way, Widening highway.

R. L. c. 48, § 97, is directory and not mandatory, and a failure of the authorities of a town to cause a description and plan of land taken to widen a public street to be filed in the registry of deeds as directed by that statute within sixty days after a vote of the town accepting the relocation does not affect the validity of the acts of the town in taking the land and widening the street.

PETITION, filed in the Land Court on August 1, 1906, to register the title to three lots of land in Needham, one of which abutted upon a town way in Needham known as High Street.

The case was heard by *Davis*, J., and the only question at issue was whether an attempted taking of land for the purpose of widening High Street, made by the town of Needham on or about September 5, 1901, of which neither the petitioner nor the holder of the record title at the time of the attempted taking had any actual knowledge, was invalid by reason of the failure of the town authorities to file, within sixty days after the passage of the vote of the town accepting the relocation, a description and plan in the registry of deeds in accordance with R. L. c. 48, § 97. The judge ruled that the taking was a valid one, notwithstanding the town of Needham did not file a description and plan in the registry of deeds for the county of Norfolk, in accordance with the provision of the statute.

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The judge made a decree determining the street line to be the new line as shown by plans filed in the case; and the petitioner alleged exceptions.

G. P. Beckford, pro se.

T. E. Grover, for the respondent.

MORTON, J. The only question in this case is whether the failure of the town authorities to cause a description and plan of land taken to widen High Street to be filed in the registry of deeds as required by R. L. c. 48, § 97, within sixty days after the vote of the town accepting the relocation, renders the act of the town in taking the land and widening the street void.

The statute provides that, "The boards, officers or other authority which purchases or takes land for street or highway purposes shall, within sixty days after the passage of its order or vote to take or purchase such land, cause a description and plan thereof to be filed for record in the registry of deeds for the county or district in which the land lies." R. L. c. 48, § 97.

It is to be noted that the statute does not provide that the taking or purchase shall be void unless a description and plan are filed, and imposes no penalty on any one for failure to comply with its directions and contains no negative words restraining the filing of the plan and description after the expiration of the time named. In other words, the statute does not in terms make the filing of the plan and description an essential part of the taking and purchase. The plan and description are not required to be filed till after the vote or order to take or purchase has been passed, and after there has been a laying out, relocating or widening. No intention is shown to amend the statutory provisions in regard to the laying out, relocating or widening of streets and highways so as to render their validity dependent upon the filing within the time named of a plan and description of the land taken or purchased. The statute is not one in regard to the laying out, relocating or widening of streets and highways, or the taking or purchasing of land therefor, but is a statute in regard to the registration of the title of land so taken or purchased, and as such is directory and not mandatory. *Pond* v. *Negus*, 3 Mass. 230. *Field* v. *Gooding*, 106 Mass. 310, 313. *Fanning* v. *Commonwealth*, 120 Mass. 388. The construction contended for by the petitioner would require us to import

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into the statute a provision that, unless a plan and description were filed as directed, the laying out, widening or relocation of a street or highway in which land was taken or purchased should be void. If the Legislature had intended such a result the language would have been more explicit. The case differs from those cases in which, as in various water acts and the metropolitan park acts (St. 1894, c. 288, § 6; St. 1882, c. 119, § 3), the filing of a plan and description in the registry of deeds constitute the only evidence of the taking. The fact that the Legislature has deemed it advisable for some reason to pass confirmatory acts (St. 1904, c. 117; St. 1906, c. 128) in some instances where a plan and description had not been filed cannot affect the construction to be given to the statute.

Exceptions overruled.

SILVERSMITHS COMPANY *vs.* REED AND BARTON CORPORATION.

Bristol. March 20, 1908. — June 16, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Corporation, By-laws, Consolidation. *Words*, "Sale."

One of the by-laws of a manufacturing corporation organized under the laws of this Commonwealth was as follows: "No sale of any shares of the capital stock of this corporation shall be valid unless the same shall have been offered in writing through the treasurer to the corporation at the lowest price at which the holder thereof will sell the same and five days shall be allowed the treasurer to purchase or decline the same." Certain shares of the corporation were held by a corporation organized under the laws of the State of New York. The last named corporation was consolidated with another New York corporation to form a new corporation, under the business corporation law of New York, which, as amended by St. of New York, 1902, c. 457, provides that, upon the consolidation of two corporations thereunder, "all the property, real, personal and mixed . . . as well as all stock subscriptions and other things in action belonging to either of them, shall be taken and deemed to be transferred to and vested in such new corporation, without further act or deed." The new corporation demanded from the Massachusetts manufacturing corporation a new certificate of shares in its own name, upon the surrender of the old certificate in the name of one of the consolidating companies, without first offering the shares to the manufacturing corporation through its treasurer in compliance with the terms of the by-law quoted above. The manufacturing corporation refused to

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make the transfer without a previous compliance with its by-law. In a suit in equity by the consolidated company against the manufacturing corporation to compel it to make such transfer and issue a certificate for the shares to the plaintiff, it was *held*, that the defendant should be ordered to issue a new certificate to the plaintiff, the title to the shares having been transmitted to the plaintiff by the operation of the statute of New York proved in the case, and not by a "sale" within the meaning of the by-law, so that the provision of the by-law had no application.

BILL IN EQUITY filed in the Supreme Judicial Court on October 23, 1907, to compel the defendant corporation to register the plaintiff as the holder of three thousand five hundred and thirty shares of its capital stock, and to issue to it a certificate therefor.

The case was heard by *Morton*, J., who reported it as follows: The stock was purchased on January 10, 1907, by the Silverware Stocks Company, a New York corporation, from one Brabrook and one Fish. The defendant transferred the stock to the Silverware Stocks Company and issued to it certificates therefor, and the stock now stands in the name of the Silverware Stocks Company on the books of the defendant. The plaintiff, a New York corporation, is the corporation resulting from a consolidation in April, 1907, under the New York business corporation law, between the Silverware Stocks Company and the Silversmiths Company, another New York corporation. The plaintiff asserts a right to the stock by virtue of this consolidation. The defendant sets up one of its by-laws which provides that "no sale of any shares of the stock of this corporation shall be valid unless the same shall have been first offered in writing through the treasurer to the corporation at the lowest price at which the holder thereof will sell the same, and five days shall be allowed the treasurer to purchase or decline the same." It was admitted by the parties that this was an original by-law adopted before the purchase of the stock in question by the Silverware Stocks Company; that the stock certificates did not contain the by-law or any reference to it or its terms; that the Silverware Stocks Company knew of this by-law on January 10, 1907, and that the plaintiff corporation knew of it from the date of the consolidation; that Brabrook and Fish before selling the stock to the Silverware Stocks Company offered to sell it to the defendant, as provided in the by-law, and that the defendant did not purchase it; that all steps necessary to effect a consolida-

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tion in accordance with the provisions of the law of New York were legally and properly taken by the Silverware Stocks Company and the Silversmiths Company; that the plaintiff is the corporation resulting from such consolidation, and that neither the plaintiff nor the Silverware Stocks Company offered the stock to the defendant in accordance with the terms of the by-law before the request for a transfer to the plaintiff.

In the opinion of the justice, the principal if not the only question being whether the stock must be offered to the defendant in accordance with the terms of the by-law before the defendant could be required to transfer the stock to the plaintiff, he reported the case by consent of the parties for determination by the full court upon the pleadings, the agreed facts and such parts of the evidence as the parties agreed should be reported.

Among the agreed facts was the following statute of the State of New York in amendment of the business corporation law of that State under which the plaintiff was created by consolidation:

"Chapter 457 of the Acts of 1902 of New York.

"An act to amend the business corporations law, relating to the transfer of property of consolidating corporations to the new corporation created thereby.

"Section 1. Section 11 of chapter five hundred and sixty seven of the laws of eighteen hundred and ninety entitled 'An act in relation to business corporations' constituting chapter fifty one of the general laws as amended by chapter six hundred and ninety-one of the laws of eighteen hundred and ninety-two is hereby amended to read as follows:

"§ 11. Transfer of property of old corporations to consolidated corporations. — Upon the consummation of such act of consolidation, all the rights, privileges, franchises and interests of each of the corporations, parties to the same, and all the property, real, personal and mixed, and all the debts due on whatever account to either of them, as well as all stock subscriptions and other things in action belonging to either of them, shall be taken and deemed to be transferred to and vested in such new corporation, without further act or deed; and all claims, demands, property and every other interest shall be as effectually the property of the new corporation as they were of the former cor-

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porations, parties to such agreement and act; and the title to all real estate taken by deed or otherwise, under the laws of this state, vested in either of such corporations, parties to such agreement and act, shall not be deemed to revert or be in any way impaired by reason of this act, or anything done by virtue thereof but shall be vested in the new corporation by virtue of such act of consolidation; and all the rights, privileges, franchises and property of the corporations, parties to any consolidation heretofore made under this act, shall vest as fully in the new corporation hereby created as they were vested in the corporations, parties to such consolidations.

"§ 2. This act shall take effect on its passage."

F. P. Fish, (*J. Smith, Jr.* with him,) for the plaintiff.

J. F. Jackson, (*F. Joy* with him,) for the defendant.

LORING, J. The learned counsel for the defendant said that it might be urged "in support of such a by-law, from the standpoint of a manufacturing corporation, that it serves a beneficial purpose in protecting those who may have brought a business to a high degree of excellence and secured for it an enviable name and standing from hostile attempts of rival interests to obtain a control or an influence over its affairs destructive of its independent existence."

The by-law adopted by the defendant is manifestly narrower than the purpose stated by its counsel.

The purpose stated by counsel covers all cases where a stockholder sells or otherwise disposes of his stock. Such a by-law was before this court in *Barrett* v. *King*, 181 Mass. 476.

The by-law here in question does not include all cases where a stockholder sells or otherwise disposes of his stock. It manifestly permits stock to pass, on the death of a stockholder, to his executor or administrator, although that might have been forbidden. See *New England Trust Co.* v. *Abbott*, 162 Mass. 148.

In the case at bar the stock in question was held by a corporation organized under laws which permitted it and another similar corporation to consolidate into a single corporation, and which provided that on such consolidation being consummated the property of each of the original corporations should vest in the new corporation by force of the statute without deed or other transfer. The question is whether a transmission of title

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to the new single corporation under such circumstances and in that way is a "sale" within the meaning of that word in this by-law.

It is not technically a sale because the consideration (if there be one) is not money but stocks, and it well may be doubted whether a barter as distinguished from a sale is included within the prohibition of the by-law, because the effect of the by-law is to give the corporation an option on the trade proposed to be made with the outsider. By the terms of the by-law the offer to be made to the corporation is an offer "at the lowest price" at which the holder will sell. Nothing but a sale for money is contemplated in case the corporation elects to accept the offer and the sale to the outsider (contemplated by the by-law) is a sale of the same kind.

The transmission of title which took place here is more like the transmission of title by operation of law where a natural person dies intestate than it is like a sale or a barter. See in that connection *Squire* v. *Learned*, 196 Mass. 134, where it was held that the bequest by a tenant of his leasehold interest is not a breach of a covenant not to assign.

The question here however is not what this transmission of title is like. The question is whether such a transmission of title is a sale within the meaning of that word in this by-law.

The transmission of title now in question was not in fact or in law either a sale or a barter. No consideration properly speaking was received for it by way of barter or sale. The old corporations passed out of existence and a new corporation came into being which succeeded to the property of the two corporations which thereby came to an end. The stock issued to the shareholders of the old corporations was issued and received, not by way of payment for something sold to another but by way of a statement of the interest which those persons who are beneficially interested therein had in the new corporation as the result of the consolidation.

Finally, the transmission of title which took place was not one which could be offered to the Reed and Barton Corporation on the same terms as those which were to be the basis of the transmission to an outsider.

We are of opinion that there was no sale of these shares of

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the old corporation to the new corporation formed by the consolidation within the meaning of that word in this by-law.

It follows that the defendant is bound to issue a new certificate to the plaintiff as the present holder of the shares in question.

So ordered.

MARSHALL S. P. POLLARD *vs.* ROSWELL B. BURCHARD & others, trustees.

Essex. March 24, 1908. — June 16, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Land Registration. Way, Private. *Estoppel.*

At the hearing on a petition for registration of the title to land bounding on a private way which had been laid out according to a plan by a company which was the common grantor of the petitioner and of the respondent, and which was used in common by all whose land was bounded thereon, it appeared that the respondent owned land abutting on the way and opposite to that of the petitioner, that the respondent was the successor of the company which laid out the way and owned the original plan and all the data regarding it, that a like petition previously had been filed by one S., who was the owner of other land bounding on the same way, of which both the petitioner and the respondent in this case were given notice, but that, after he had examined such petition, the respondent, finding that the plan submitted with it purported to be in accordance with his plan so far as the way was concerned, entered no appearance in that case, that the judge of the Land Court was not satisfied with the location of the way as shown on the plan filed by S. with his petition, and advised S. to secure the original data, which were in the possession of the respondent's engineer, that such engineer refused to give such data and thereupon S. procured data elsewhere from which a new plan was made, and the Land Court granted S.'s petition, locating the way so far as it bounded on his lots according to S.'s new plan. The location was erroneous, but, if the Land Court had had the data which were in the possession of the respondent's engineer, no mistake would have been made. It did not appear that the respondent ever was asked for or refused to give such data. The petitioner in this case sought to have the way located as it had been decided to be in S.'s case. The respondent contended that it should be located as it actually was laid out, namely, as it was on the original plan. *Held*, that the decision in S.'s case applied only to S.'s lots and the part of the way on which they bounded; *and*, that there was nothing in the circumstances to prevent the respondent's insisting upon having the way properly located where it bounded on his land.

PETITION for the registration of the title to a tract of land at Eastern Point, Gloucester, filed in the Land Court February 13, 1907.

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The respondents are the successors of the company which, as stated in the opinion, originally laid out the large tract of which the petitioner's land was one parcel, and the original plan and all the data relating thereto were in the possession of their engineers, Aspinwall and Lincoln.

There was a hearing before *Davis*, J. The facts are stated in the opinion. At the close of the evidence, the respondents requested the judge to rule "that, in so far as the lines of the way were not determined in the Stacy case, they should be laid down according to the Aspinwall and Lincoln plan offered by the respondents in this case." The judge refused so to rule and ordered a decree for the petitioner according to the petitioner's plan, and the respondents excepted.

R. L. Raymond, for the respondents.

G. C. Richards, (*A. P. White* with him,) for the petitioner.

MORTON, J. The question in this case is whether the respondents are prevented, on the ground of estoppel or otherwise, by what was decided by the Land Court in the Stacy case, from showing as between themselves and the petitioner where the true lines of the way are so far as opposite lands of the petitioner and themselves are bounded upon it, and whether the Land Court was right in ordering a decree to be entered for the petitioner.

The material facts, the exceptions state, are contained in the decision of the Land Court which is given in full in the bill of exceptions. It appears that the petitioner and respondents and Stacy all derive title from a common grantor, a company owning a large tract of land which it laid out as delineated upon a plan which it caused to be recorded in the registry of deeds. The ways delineated upon this plan, including the way in question, are all private ways. Stacy was the owner of five lots all bounding on a way called Eastern Point Boulevard (West). Two of them also bounded respectively on ways called St. Louis Avenue and Lake Avenue. The petitioner's land bounds on Eastern Point Boulevard (West). The land of the respondents bounds in part on the Boulevard and in part on Lake Avenue. Stacy's lots are on both sides of the Boulevard, and one of them is on one side of the land of the petitioner, and another is on the other side. Stacy filed a petition for the registration of the title to all of his lots, describing and numbering them according to the aforesaid

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plan in the registry of deeds and filing with this petition, as required, a plan which he claimed to be in accordance with the recorded plan. We assume, although it nowhere distinctly appears, that he asked in his petition to have the line of the Boulevard determined as the petitioner in this case has done. The respondents were duly notified of the pendency of the petition and "examined it and finding that it purported to be according to their own plan entered no appearance and took no further part in the matter." The Land Court was of the opinion, acting under the advice of its own engineer, that, while the original lines could be readily located upon the ground with the field notes and other data owned by the respondents and in the possession of their engineers, it would be difficult for any other engineer to locate them correctly without such data, and it accordingly advised Stacy to obtain such data. Stacy applied to the engineers employed by the respondent for it, and was refused.* There is nothing to show that he ever applied to the respondents, or that they ever had any actual knowledge of the application to their engineers. Thereupon in part through agreement between Stacy and other parties, except the respondents, and in part by the engineers employed by Stacy and such other parties, the lines of said Boulevard were determined for the Stacy lots, with a right as appurtenant thereto to use in common with others the Boulevard as located on a plan filed by Stacy. It is now in substance conceded, and the judge of the Land Court so finds, that the plan in the Stacy case did not accurately locate the Boulevard on the ground as shown in the original plan. But the judge also finds that if the parties and engineers in the Stacy case had had the data in the possession of the engineers of the respondents, the lines could have been

* The finding of the judge of the Land Court on this point was as follows: "The data were refused. What offers or requests for Aspinwall and Lincoln's own professional services in connection therewith may have been made does not appear and is immaterial. The data requested were the property of the respondents under whose predecessor the Stacy petitioner claimed title, and supplemented by a ground location the recorded plan to which the Stacy petitioner referred in his application for registration. The Stacy petitioner insisted upon his right to employ such engineer as he chose, provided his work should appear to be correct and consistent."

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accurately located, and the neglect or failure of the respondents and their engineers to furnish such data is the estoppel relied on. If the lines established in the Stacy case are to be continued as the Land Court holds in this case, on general principles, that they ought to be, a small strip will be taken from land belonging to the respondents on the shores of Fresh Pond opposite to the land of the petitioner. No question as to prescriptive rights is involved, and the respondents concede that, notwithstanding the decision in the Stacy case was erroneous, they are bound by it so far as it established the lines of the Boulevard for the Stacy lots; but they contend that there is nothing in that case or in their conduct concerning it to prevent or estop them from showing where the true lines of the way are as between them and the petitioner. And we think that they are right.

The Stacy case only settled the title to the Stacy lots and the lines of the Boulevard so far as the Stacy lots bounded upon it. It did not settle and could not settle the lines of the Boulevard where opposite lands of the petitioner and of the respondents were bounded upon it. That issue was not involved in the case.

Neither do we see any ground on which the doctrine of estoppel can be invoked against the respondents in respect to that case. The respondents and their engineers have not done or said or omitted to do or say anything on which the petitioner had a right to rely and has relied in regard to the boundary of his lot on the Boulevard. The most that can be said is that, if they and their engineers had produced in the Stacy case the data in their possession and control, the result in that case would have been different and the lines would have been established according to the true location of the way. But that does not estop them from showing where the true lines are in this case.

The result is that we think that the respondents, as between themselves and the petitioner, are entitled to have the lines of the way determined according to their true location and that the exceptions should be sustained.

So ordered.

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FREDERICK L. CUTTING *vs.* ATLAS MUTUAL INSURANCE COMPANY, NATHAN A. DOWNS, petitioner.

Suffolk. March 25, 1908. — June 16, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Insurance, Fire, Construction of policy. *Words*, "Exhausted."

The A. insurance company insured a company, which owned and operated a system of tanks and pipes for the storage and transportation of petroleum and its contents in various localities in Pennsylvania, against loss by fire to an amount not exceeding $25,000 "on iron tanks and their contents consisting of petroleum and its products, all while contained in the State of Pennsylvania," and the policy contained the provision, "It is understood and agreed that this insurance shall not attach until all specific insurance is exhausted." A tank and its contents belonging to the insured and situated at Marcus Hook, Pennsylvania, was destroyed by fire and, at the time of such loss, the insured, besides the policy above described, had other insurance on the property so lost and also on other property situated at Marcus Hook, and, after so much as was due under these policies upon the loss in question had been paid, the insured sought to recover the balance of the loss from the A. company. The other policies were still in force as to other property at Marcus Hook, and the A. company contended that the insurance which such other policies provided was "specific," and that it was not "exhausted." *Held*, without deciding whether the other insurance was or was not "specific," that the word "exhausted" used in the A. company policy meant exhausted as to any loss as to which recovery was sought, and therefore that, since no more could be recovered under the other policies as to the loss in question, the insured could recover under the policy of the A. company.

In construing a policy of insurance, such construction should be adopted, if fairly warranted, as will best carry out the object for which the contract was entered into, namely, that of securing indemnity to the insured for the losses to which the insurance relates.

PETITION, filed October 8, 1904, in receivership proceedings concerning the Atlas Mutual Insurance Company in the Supreme Judicial Court for the county of Suffolk, to establish a claim under a fire insurance policy of that company.

There was a hearing before *Morton*, J., upon the pleadings and an agreed statement of facts, and he reserved the case for consideration by the full court.

A. C. Burnham, for the petitioner.

F. T. Hammond, receiver, *pro se*.

MORTON, J. This is an intervening petition in receivership proceedings concerning the Atlas Mutual Insurance Company to establish a claim for a loss by fire under a policy issued by

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that company on January 2, 1903, to the United States Pipe Line Company, insuring it for one year "For account of whom it may concern," against loss by fire to an amount not exceeding $25,000.

"On iron tanks and their contents consisting of petroleum and its products, all while contained in the State of Pennsylvania.

"Privilege to make additions, alterations and repairs, this insurance to cover same, to use oil or other lights, and to work at all hours, and for other insurance without notice until required.

"It is understood and agreed that this insurance shall not attach until all specific insurance is exhausted."

The Pipe Line Company was engaged in storing and transporting petroleum and had tanks at various places in Pennsylvania, where oil was stored. On July 8, 1903, one of these tanks situated at Marcus Hook, Pennsylvania, was damaged by fire and its contents destroyed, and on July 11, 1903, another tank situated there was also damaged by fire and its contents destroyed. This petition seeks to recover of the Atlas Company for these losses. The Pipe Line Company assigned to the petitioner all its rights under the policy after the losses had occurred. At the time of the fires the Pipe Line Company had other insurance on the property destroyed and on other property situated at Marcus Hook, amounting to $275,000. All of these policies, except three, insured the company against loss "on iron tanks and their contents consisting of petroleum and its products, all while contained at Marcus Hook, Delaware County, Pennsylvania." The only difference in regard to the three was that those described the contents as "consisting of refined petroleum," instead "of petroleum and its products." This difference is immaterial. All of these policies contained what is known as a "co-insurance clause." In some of them the policies provided, in substance, that the companies should not be liable for a greater proportion of the loss than the amount of the policy bore to ninety per cent of the value of the property insured. In the others the proportion was that which the amount of the policy bore to the whole value of the property insured. The value of the property insured under these policies was largely in excess of the amount of insurance, and only a portion of the losses sustained could, therefore, be collected under

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them. The petitioner contends that the insurance under the other policies was not "specific insurance," and that, if it was, it has been "exhausted," and that the Atlas Company is liable up to the amount insured by it for the balance of the loss. The receiver contends that the insurance under the other policies constituted "specific insurance" within the meaning of those words as used in the policy issued by the Atlas Company, and that it has not been "exhausted," and that the Atlas Company is not therefore liable. These contentions present the questions at issue, which are, first, whether the insurance under the other policies constituted "specific insurance," and second, whether if they did, it has been "exhausted." It is agreed that if it did not constitute "specific insurance," or that, if it did and it has been "exhausted," the petitioner is entitled to recover, but if it constituted "specific insurance" and has not been "exhausted" then the petitioner is not entitled to recover. The question of interest in case of recovery is left for future adjustment.

We do not find it necessary to consider whether the insurance was specific or not, since we are of opinion that, if it was specific, it was exhausted. The contention of the receiver is, in substance, that, inasmuch as the policies still attach to other property at Marcus Hook, and the companies issuing them will be liable thereunder up to the full amount insured for other losses that may occur, the insurance has not been exhausted. In other words the contention is, not that the specific insurance has not been exhausted in respect to the amount collectible on account of these losses, but that the full amount of insurance has not been exhausted and that until that happens the Atlas Company and other companies insuring under like policies are not liable. We do not think that the construction contended for by the receiver is the true one. The contract of insurance is one of indemnity. It is to be fairly and justly interpreted according to the language used. But the purpose of the contract is to be borne in mind in construing it, and such a construction is to be adopted as, if fairly warranted, will best carry out the object for which the contract was entered into, namely, that of securing indemnity to the insured for the losses to which the insurance relates. *Dole* v. *New England Ins. Co.* 6 Allen, 373, 385. It is no doubt true, as contended by the receiver, that, speaking gen-

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erally, under what is termed the co-insurance clause, the insurer's liability in case of loss is determined by the proportion which the amount insured by each insurer bears to the total amount of insurance, and that it is the amount of the insurance, in other words the face value of the policy, which is one of the determining factors. *Farmers' Feed Co.* v. *Scottish Union Ins. Co.* 173 N. Y. 241. But that affords no just criterion by which to measure the insurer's liability in a case like that before us. The policy in this case was what is termed a "floating policy," and was intended to supplement the specific insurance and to attach when the specific insurance ceased to cover the risks. *Peabody* v. *Liverpool & London & Globe Ins. Co.* 171 Mass. 114. The two together were meant to afford up to the amount insured complete indemnity for losses arising from the risks insured against, except so far as the insured was, if at all, a co-insurer, and should be construed accordingly. According to the construction contended for by the receiver, the insurance would fall far short of affording such indemnity in this case and in similar cases. The Atlas policy would not attach, according to his contention, until the entire amount of specific insurance had been required for the payment of losses. But we think that specific insurance is exhausted, not only when the entire amount so insured is required to meet a loss, but also when all that is collectible in respect to any given loss has been paid. In the latter case we think that it may be as fairly said as in the former, that the specific insurance is exhausted. It would no doubt be competent for parties to agree that a floating policy should not attach until the entire amount of the specific insurance had been required for the payment of losses. But it is loss from specified risks which parties insure against, and in respect to which they seek indemnity, and, in the absence of such an agreement, the most natural and reasonable construction is, it seems to us, that specific insurance is to be deemed to have been exhausted when all that can be collected has been collected for a loss arising from any of the risks so insured against. In some of the policies referred to in the agreed statement of facts the language is much more explicit, but the meaning is, we think, in substance and effect the same.

Decree for the petitioner.

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EBEN SEARS *vs.* ADELAIDE L. S. GILMAN & another.

Suffolk. March 26, 1908. — June 16, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Mortgage. Trust. Equity Jurisdiction, To redeem land conveyed as security by deed absolute in form. *Laches. Bankruptcy.*

Where the owner of land conveys it by a deed absolute in form to one who receives it under a parol agreement that the grantee shall hold it to secure the payment of a debt due him from the grantor, such agreement may be discharged without an instrument in writing by a subsequent parol agreement which leaves the title absolute in accordance with the terms of the deed.

One who was the owner of a two sevenths interest in the real estate of a deceased person and was the administrator of his estate, becoming heavily indebted to the owner of the other five sevenths interest in the real estate, who had trusted implicitly to his management, in 1868, without the knowledge of the latter but acting as his agent, conveyed to him his two sevenths interest by deed absolute intending that it should be security for the amount owed to the grantee. The value of the property conveyed was less than the amount of the debt owed. In 1876 the grantor had put himself in a position where he could contend either that the property was held by the grantee as security, or as payment *pro tanto* of the debt. In that year the grantor in an account to the grantee credited himself with the value of the real estate conveyed as payment *pro tanto*, and in his schedule in voluntary bankruptcy proceedings, filed in the same year, did not include the equity in the land as his own, and scheduled as the debt due to the grantee such balance as would have been left if the land had been applied as payment *pro tanto*. The grantee thereupon took entire management and control of the land and sold part of it, and the grantor acquiesced therein until 1903. In 1905 the grantor by a bill in equity sought to have the conveyance of 1868 declared to be in security for a loan, and to redeem the property therefrom. *Held*, that the bill should be dismissed, both because the understanding of the parties in 1876 that the land should be applied as a part payment of the debt relieved the conveyance from the agreement that the land should be treated as security for the debt, and also because the plaintiff through his long acquiescence was barred by laches.

Where one by a deed absolute in form conveyed land to one who agreed to hold it as security for the payment of a debt owed to the grantee by the grantor, and the land so conveyed was worth less than the amount of such debt, and the grantor in 1876 was adjudicated a bankrupt under the national bankruptcy act then in force and agreed with the grantee to treat the land as payment *pro tanto* of the debt, there was no fraudulent preference, since, the land being of less value than the debt owed, the equity was of no value to the creditors.

BILL IN EQUITY, filed in the Supreme Judicial Court for the county of Suffolk May 23, 1905, to redeem certain real estate alleged to have been conveyed by the plaintiff to the defendant

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Adelaide L. S. Gilman (hereinafter called the defendant) by a deed absolute in form, but in fact as security merely for the payment of sums due her from the plaintiff. Gorham D. Gilman, the defendant's husband, is joined as a defendant.

The case was referred to a master who filed a report, and, upon various recommittals, two supplementary reports. The substance of the original and supplementary reports is as follows: *

"I find the facts to be as follows: The plaintiff and the defendant are brother and sister. Their uncle, Richard Crease, died in 1866, leaving a large amount of real and personal property, and a will devising the residue of his estate among his seven nephews and nieces, the nephews to take outright and the nieces on certain trusts, which were declared void for remoteness by the Supreme Judicial Court in June, 1869 (*Sears* v. *Putnam*, 102 Mass. 5), with the result that each residuary legatee took one seventh of the estate in fee. . . . The plaintiff was appointed administrator with the will annexed on October 8, 1866. He was at that time engaged in the real estate and shipping business with his brother, Richard W. Sears, as his only partner. The defendant, who was then twenty-six years old and unmarried, lived with one of her sisters. She had some property of her own, which was held by trustees. She was not familiar with business affairs, and all the matters connected with the management of her property she left to the plaintiff, in whom she had implicit faith, and whose advice she followed without question. Shortly after his appointment as administrator of the will of Richard Crease, the plaintiff began to mingle the funds of the estate with his own funds. The plaintiff testified that 'it was largely a matter of policy for all interested for me to do so.' The plaintiff introduced no evidence of any agreement to this effect among the parties except what appears in this report and any inferences that may be drawn from the accounts. . . . I find that the plaintiff never has paid the defendant anything out of the personal estate. He has settled with the other heirs for their share of the personalty. On February 19, 1867, Richard W. Sears, who was heavily indebted to the plaintiff, conveyed to him all his interest as an heir in the

* For convenience the amendments and additions contained in the supplementary reports are combined with the original and given as one report.

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real estate of Richard Crease, so that the plaintiff became the owner of two undivided sevenths of that real estate.

"On July 7, 1868, the plaintiff prepared and executed a warranty deed in the form annexed to the bill, conveying to the defendant (then Adelaide L. Sears), all the plaintiff's interest (then two sevenths) in the real estate of Richard Crease, and on July 24, 1868, the plaintiff acknowledged and recorded it. This is the conveyance from which the plaintiff now seeks to redeem. The plaintiff did not consult his sister at this time nor inform her of his intention, but prepared, executed, and recorded the deed without her knowledge, and she did not know anything about it for a considerable period of time afterwards. The value of the property conveyed was about equal to the one seventh interest of the defendant in the personal estate of Richard Crease. The consideration stated in this deed was $12,000. I find that no actual consideration passed between the parties unless the deed was made and accepted as payment towards the defendant's share of the personal estate of Richard Crease. . . . In 1873 a suit was brought against the plaintiff and defendant by creditors of Richard W. Sears, who sought to reach his interest in the Crease real estate which had been conveyed through the plaintiff to the defendant. *Giddings* v. *Sears*, 115 Mass. 505. The validity of the conveyance of July 7, 1868, was a material issue. . . . [At the hearing of the suit before a master] the plaintiff testified 'that he made this conveyance to his sister and had it recorded and kept it for her, acting for her as her agent as he did in regard to her other property.' . . .

[After a statement of evidence, the report continued:] "I find that the plaintiff made the conveyance of July 7, 1868, to the defendant without her knowledge, at a time when he was in financial difficulties and had not in his possession, intact, sufficient of the personal estate of Richard Crease to pay to the beneficiaries, other than his brother and himself, their shares in full, for the purpose of making sure that the defendant would get her share of the estate of Richard Crease, and of preventing any other creditors from reaching this property to her injury, and intending, in case he should subsequently be able to settle the Crease estate and distribute the personal property, to have a settlement with his sister, and upon adjusting his account as ad-

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ministrator with her to have the real estate reconveyed to him if he so desired, and intending, if unable so to adjust his account, to have a settlement with his sister based on an equitable valuation of the real estate. I find that he did not communicate his intention to her at the time of making the conveyance. . . .

"After [a certain] conveyance to [other heirs] the defendant held title to . . . five parcels of land all in Boston. . . . If the plaintiff's position is correct, the defendant owned one third of this property in her own right, and held two thirds as security for his indebtedness to her.

"All of the Richard Crease real estate was managed from 1866 to the time of division by the plaintiff, acting for all the heirs, and he continued in charge of the five parcels above-described after the division [with other heirs above referred to] until some day about July 1, 1874, when their management was undertaken by the defendant Gorham D. Gilman, who had married Adelaide L. Sears upon May 6, 1874, and since then the plaintiff has not had the management of any of this property, except as hereinafter stated. Gorham D. Gilman took charge of this property, as representing his wife and acting for her, and thereafter the plaintiff had no further dealings or communications (prior to 1903) directly with his sister in relation thereto, but all dealings and communications with this property were had between the plaintiff and Gorham D. Gilman, representing the other defendant, who thereafter obtained all knowledge in relation to the property through Gorham D. Gilman.

"The plaintiff has rendered three accounts to the defendant. . . . The first account covered the period from 1866 to January 1, 1874, and the second from January 1, 1874, to January 1, 1875. Both were rendered to G. D. Gilman at his request after his marriage to the defendant, and both were made up on the same general principle. They contain no reference to the conveyance of July 7, 1868, but the plaintiff charges himself with owing his sister one seventh of the personalty of the Crease estate. In the first account the plaintiff credited his sister with one seventh of the rents collected from the Crease real estate, and in the second account with one fifth of these rents collected after the settlement with [the two heirs previously referred to]. These are the proportions of the rents

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which the defendant would be entitled to if the plaintiff's claim is correct, and the plaintiff claims that the rendering to G. D. Gilman of these accounts made up on this basis was notice to him and to the defendant that the plaintiff claimed that the conveyance of July 7, 1868, was by way of security only. The balance due from him by the first account was $17,407.38 and by the second account was $19,436.85. The third account was dated September 18, 1876. It was made up on an entirely different principle from the two preceding accounts in that it treated the plaintiff's indebtedness to his sister as extinguished by the real estate conveyed by the deed of July 7, 1868. The plaintiff charges himself with the balance of his previous accounts and credits himself with the property conveyed to his sister at the valuation put upon it by Willard Sears, leaving a balance due from him to the defendant of $1,492.27. This account was signed 'Boston, September 18, 1876. E. Sears,' in the plaintiff's handwriting. The plaintiff admitted his signature, but denied all recollection of how the account came to be made out in this manner. I find that the account was prepared in the plaintiff's office by his son, signed by the plaintiff, and sent to G. D. Gilman, and that the immediate cause of its preparation was the intention of the plaintiff to go into bankruptcy. . . .

"On November 15, 1876, the plaintiff filed a petition in bankruptcy. His schedules were signed and sworn to by him, and contained separate lists of secured and unsecured creditors of real estate owned by him, and of all real estate held in trust or in which he had any interest in reversion, remainder, or expectancy. The petition contained the printed statement that schedule B 'verified by your petitioner's oath contains an accurate inventory of all his estate both real and personal assignable under the provisions of said acts.' A. L. Gilman was scheduled as an unsecured creditor on open account for $1,492.27, the balance as stated in the account of September 18, 1876. She does not appear in the list of secured creditors. The schedules of real estate owned by the bankrupt, or held in trust for him, or in which he had any interest in reversion, etc., contained no mention of any interest in the real estate conveyed to the defendant by the deed of July 7, 1868. A proof of claim for $1,492.27 was made out by the bankrupt's attorney and sent to

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the defendant, with a request for a power of attorney to vote for assignee. These were signed by the defendant and sent to the plaintiff, who subsequently sent word to the defendant that they were incorrect, and the papers were never used. The plaintiff made no attempt to amend his schedules or inform the defendant in what respect they were incorrect. The plaintiff testified that he had little to do with making out his schedules which were prepared by clerks in his office; that they were 'wrong in every way'; that he swore to them 'in a general *pro forma* way,' and that he did not consider the real estate held by his sister an asset because he did not consider it worth anything over and above what he owed her. The plaintiff was an experienced man of business, and I find that he knew that his sister held this real estate; that it was his duty to schedule it if she held it as security, and that it was not scheduled. I find further that he intended, throughout his bankruptcy proceedings, to treat the amount he owed his sister, and did treat it, as paid *pro tanto* by the conveyance of July 7, 1868. . . . The plaintiff received his discharge in bankruptcy January 21, 1879.

[After a statement of evidence, the report stated that, after assuming the management of the property, and before 1897, G. D. Gilman sold all but one parcel; and continued:] "I find, upon all the evidence, that the defendant Gorham D. Gilman, on taking possession of this property, in July, 1874, was not acquainted with the circumstances under which it was conveyed to his wife, but supposed it to belong to her outright, and so treated it thereafter; and that he first actually knew of the plaintiff's claim in the fall of 1908, when the plaintiff, to whom he had frequently made small loans, applied for a loan, which was refused, whereupon the plaintiff claimed an interest in the Harrison Avenue property, and proposed to raise money by mortgaging it. I find that during this period Gorham D. Gilman had no reasonable cause to believe that the plaintiff claimed any interest in this property. In making this finding I have considered the fact that the accounts submitted to G. D. Gilman, on his taking possession of the property, credited his wife with only a part of the rents collected by the plaintiff. I also find that during this period the plaintiff never asked for an accounting from either defendant, and that no attempt was made by the defendant

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Adelaide L. Gilman to enforce any indebtedness of the plaintiff to her. . . .

" I have reported all the facts which, in my opinion, have any bearing on the question of laches. So far as it is a question of fact, I find that the plaintiff, by conveying this property to his sister and by his subsequent dealings with her, had, by the time of his bankruptcy proceedings in 1876, if not before, put himself in a position where it was possible for him to make either of two claims: (1) that the conveyance was by way of security; or (2) that it was by way of and had been accepted as payment; and that he left the property in his sister's possession for nearly thirty years without demanding any accounting or asserting his right to redeem in an unmistakable manner; and so far as it is a question of fact I find that he has been guilty of laches."

The case was heard on the master's reports and exceptions thereto by *Loring*, J., who made the following memorandum of findings:

" Up to the time of the plaintiff's bankruptcy I think that on the findings of the master the plaintiff intended the status of the two sevenths interest which he had conveyed to his sister to be vague. He conveyed this property to her because he had used some of the estate belonging to her and he did not want her to lose her share. But whether this conveyance was to be as security or whether it was to be taken as payment of the amount which he owed to her, it was not then decided. Then he went into bankruptcy — or rather, just before he went into bankruptcy, his sister was married. I find as an inference from what the master had found, if the master hasn't found it himself — I think he has found it, and I think it is conclusion of law from his report, — but if there is any doubt about that, I find it to be a fact that at the time of his sister's marriage, and in connection with his own bankruptcy, he determined that this conveyance of the two sevenths should thereafter be treated as a final adjustment and payment of the amount which he owed her so far as it went to pay it, adopting the valuation which had been put upon it. Now plaintiff's counsel says there is no offer and no acceptance. Well, the parties have acquiesced in that as a matter of fact for thirty years, and whether by reason of that

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fact he is guilty of laches, or whether, as I should prefer to say, the acquiescence is an agreement of itself, that is the end of it. The plaintiff at this time cannot come in and undertake to say that it has been nothing but security during all this period, during which the parties acquiesced and agreed that it should be a payment *pro tanto*. It can no longer be regarded as an open question whether it was security or payment, after a period of thirty years of acquiescence by both in the idea of final payment *pro tanto*. I can see no difficulty in law in such an arrangement being made by parol. All that there was was an absolute conveyance, which, if it had been intended by both parties as security, could have been shown to have been so intended, and such intent in the conveyance could have been made out by word of mouth. That is all there was. Now if under those circumstances they come together and by word of mouth agree that it is not to be taken as security, there is no rule of law which prevents that being done."

The case was thereupon reported by the single justice for consideration by the full court.

S. C. Bennett, for the plaintiff.

H. W. Dunn, (*J. N. Clark* with him,) for the defendants.

KNOWLTON, C. J. This is a bill to redeem certain real estate conveyed by the plaintiff to his sister, Mrs. Gilman, the principal defendant, who will hereinafter be called the defendant, on July 7, 1868. The deed was absolute in form, and was given for the protection of the defendant from loss by reason of a large indebtedness due her from the plaintiff, which had grown up in connection with his settlement of her uncle's estate in which she was interested as a devisee, and from his management of her property. She trusted him implicitly, and he acted for her in all matters of business pertaining to her property, without restriction. In her behalf he accepted the deed and had it recorded, giving her no information of it until afterwards. In 1876 he went into bankruptcy, and the master has found that by that time, "if not before, he had put himself in a position where it was possible for him to make either of two claims, (1) that the conveyance was by way of security, or (2) that it was by way of and had been accepted as payment; and that he left the property in his sister's possession for nearly thirty years without

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demanding any account or asserting his right to redeem in an unmistakable manner." He added, "and so far as it is a question of fact, I find that he has been guilty of laches."

The judge who heard the case upon the master's original and supplementary reports and the plaintiff's exceptions thereto decided that the suit could not be maintained, and reported the case to this court.

The decision for the defendant rests principally upon two grounds: first, that before the plaintiff's bankruptcy in 1876, or about that time, it was understood by both parties that the absolute deed of conveyance from which the plaintiff now seeks to redeem was to be treated as a transfer of the real estate in payment *pro tanto* of the plaintiff's indebtedness to the defendant, it being considered that this indebtedness was more than the value of the property; and, secondly, that, if the defendant's title did not become good as against the plaintiff by virtue of such an understanding, the plaintiff has been guilty of laches in leaving the property in the defendant's possession without making any claim to it for nearly thirty years, and thereby is precluded from recovery. The defendant is well sustained on both propositions by the master's findings of fact, and by conclusions of fact of the single justice in dealing with the rulings requested. These findings are justified, if not absolutely required, by the evidence reported.

The plaintiff strongly contends that, upon the findings of the master, the deed was at first held merely as security, and that the plaintiff's right to redeem could not be conveyed or surrendered without an instrument in writing, such as is needed under the statute of frauds for the transfer of interests in real estate. If the original purpose was only to give security and to leave the plaintiff with a right to redemption, this purpose was not expressed in the writing, and it could only be made effectual for the protection of the plaintiff by testimony which would establish an equity in his favor. Where a deed is absolute in form and the equities of the grantor to have it held for security lie only in parol, these equities may be discharged by a subsequent parol agreement which leaves the title absolute in accordance with the terms of the deed. *Cramer* v. *Wilson*, 202 Ill. 83, 90. *Baxter* v. *Pritchard*, 122 Iowa, 590, 591. *McMillan* v. *Jewett*,

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85 Ala. 476, 481. *Stall* v. *Jones*, 47 Neb. 706, 716. *Peugh* v. *Davis*, 96 U. S. 332, 337. It is held in this Commonwealth and elsewhere, that even where the writings show a mortgage in the form of an absolute deed accompanied by a separate bond of defeasance, the equity of redemption may be given up by a cancellation or redelivery of the bond, and the true state of the title will be sufficiently shown by the original, absolute deed. *Trull* v. *Skinner*, 17 Pick. 213. *Falis* v. *Conway Ins. Co.* 7 Allen, 46. *West* v. *Reed*, 55 Ill. 242, 245. *Haggerty* v. *Brower*, 105 Iowa, 395, 400. *Shaw* v. *Walbridge*, 33 Ohio St. 1, 5. *Watson* v. *Edwards*, 105 Cal. 70, 76. See *Trow* v. *Berry*, 118 Mass. 139, 148. Upon the facts and findings in the present case, the determination of the plaintiff to treat the conveyance as absolute, operating as a payment of his indebtedness to the defendant to the amount of the value of the property, which determination was made known to the defendant and acquiesced in by her, and subsequently acted upon by both for nearly thirty years, was a surrender by the plaintiff of his original right of redemption, which left the defendant with an absolute title.

There was an ample consideration for this in the payment *pro tanto* of his debt to the defendant, which then exceeded the value of the property conveyed.

There is no ground for the contention that this surrender of the right of redemption was a fraudulent preference under the bankruptcy act. Upon all the evidence, the right was of no consequence to his creditors because the property was not of sufficient value to pay the debt. There was simply an adjustment of a matter which previously had been left open for adjustment. There is no evidence of an intent to defraud the plaintiff's creditors.

If this defense were not established, the plaintiff, upon the facts and findings, would be barred by his own laches.

Bill dismissed with costs.

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SELECTMEN OF AMESBURY & others *vs.* CITIZENS ELECTRIC STREET RAILWAY COMPANY.

Essex. March 27, 1908. — June 16, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Street Railway, Wrongful discontinuance of use of track. *Statute.*

St. 1906, c. 463, Part III. § 76, providing that, "if a street railway company without right or lawful excuse discontinues the use of any track and when requested . . . refuses to operate the same," the mayor of the city or the selectmen of the town in which the track is located may compel such company to resume the use of the track by petition to the Supreme Judicial Court, was intended to and does give redress for such a wrongful discontinuance happening before the passage of the statute.

Where by its original charter the right of a certain street railway company to lay its tracks upon the public streets was made subject to the determination of the authorities of the respective municipalities in which such streets lay, and such authorities, after one year from the opening of the tracks for use, might at their pleasure revoke such location, upon which revocation the tracks must be taken up, and where, as to the location granted by the authorities of a certain town, there was no agreement or statutory enactment requiring such company to continue the use of its tracks in the town as a condition of the grant of location therein, a discontinuance of such use is not "without right or lawful excuse" and gives to such town no right by petition to the Supreme Judicial Court under St. 1906, c. 463, Part III. § 76, to compel a resumption of the use of the track.

PETITION, filed in the Supreme Judicial Court for the county of Essex on August 10, 1906, under St. 1906, c. 339, now St. 1906, c. 463, Part III. § 76, by the selectmen of the towns of Amesbury and Merrimac to compel the respondent to resume the operation of a part of its street railway, called the Pleasant Valley line.

The case was referred to a master, who filed a report, to which the respondent filed exceptions, upon which there was a hearing before *Morton*, J., who reserved the case for consideration by the full court.

G. W. Cox, (*J. F. Bacon* with him,) for the respondent.

A. W. Reddy & T. H. Hoyt, for the petitioners, submitted a brief.

B. W. Warren, for persons not before the court, filed a brief by leave of court.

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SHELDON, J. This petition is brought under St. 1906, c. 339, now St. 1906, c. 463, Part III. § 76, to compel the respondent to resume the operation of a certain part of its railway, called the Pleasant Valley line. The defendant had abandoned and discontinued the operation of this line in January, 1905; and the first question is whether the petition can be maintained under a statute passed more than a year thereafter.

This statute in no way affected the rights of the parties; it expressly provided that nothing therein contained should be "deemed a legislative construction of any existing law or an impairment of any existing right of a street railway company to discontinue the use of tracks." It simply provided a new remedy for any unlawful discontinuance by giving a direct resort to the courts. It furnished a new remedy; but it impaired or affected no contractual obligations and disturbed no vested rights. As it was purely remedial in its character and did not change any existing rights, it naturally would be applicable to proceedings begun after its passage, though relating to acts done previously thereto. This is the doctrine which was declared in *Foster* v. *Essex Bank*, 16 Mass. 245, 273. It has been applied in the construction of many similar statutes, so as to make a new remedy available for the protection of a prior right or for the redress of formerly existing grievances. *Bemis* v. *Clark*, 11 Pick. 452, 454, *Simmons* v. *Hanover*, 23 Pick. 188, 194. *Wood* v. *Westborough*, 140 Mass. 408, 409. *Rogers* v. *Nichols*, 186 Mass. 440. It was the plain intention of the statute to provide a remedy for a case like this by giving redress for a wrongful discontinuance already existing as well as for any that might occur in the future. It cannot be held that the words "if a street railway . . . discontinues the use of any track" apply merely to a future discontinuance. A somewhat similar contention was considered and rejected in *Commonwealth* v. *Dracut*, 8 Gray, 455, and *Brown* v. *Pendergast*, 7 Allen, 427. In the former case the court relied on "the long-established rule of construing statutes according to the manifest intent of the Legislature, though apt words to express that intent may not be used, or though such construction may not accord with the letter of the statute." And in the latter case the court said, "We apply an old and unshaken rule in the construction of statutes, to wit, that the intention of a

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remedial statute will always prevail over the literal sense of its terms, and therefore, when the expression is special or particular, but the reason is general, the expression should be deemed general." The rule of cases like *Garfield* v. *Bemis*, 2 Allen, 445, where the giving of a new remedy would result in the revival of a former right which has absolutely lapsed, is not to be applied here. This petition can be maintained if the respondent's discontinuance of its Pleasant Valley line was without right.

When the respondent company purchased these lines of railway in 1899, it had authority under St. 1899, c. 304, to complete the railway and its equipment, and to maintain and operate the same. But there was nothing compulsory in these provisions; and the respondent would not have lost its property rights in the rails or materials or in any other real or personal estate which it had acquired, if it had entirely failed to operate the railroad. *French* v. *Jones*, 191 Mass. 522. But it did assume control of all the routes which it had bought, including this Pleasant Valley line, and continued to operate them all until it discontinued the use of this line in January, 1905.

The respondent, like all street railway companies, and like the lighting company spoken of in *Weld* v. *Gas & Electric Light Commissioners*, 197 Mass. 556, is a *quasi* public corporation, organized for the exercise of an important public franchise, and bound to exercise that franchise for the benefit of the public and not merely for its own profit. Shaw, C. J., in *Commonwealth* v. *Temple*, 14 Gray, 69, 76. But it has not, like steam railroads, an exclusive control and a vested right of property in the soil upon which its tracks are laid. In the original charter given to this company's predecessor, the Newburyport and Amesbury Horse Railroad Company, (St. 1864, c. 53,) its right to lay its tracks upon the public streets was made subject to the determination of the mayor and aldermen or selectmen of the respective cities or towns, and those officers, after one year from the opening of its tracks for use, might at their pleasure revoke the location thereof, and the tracks thereupon must be taken up. Similar provisions were either contained in other street railway charters or were afterwards supplied by amendments thereto. Accordingly, this court said, in *Attorney General* v. *Metropolitan*

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Railroad, 125 Mass. 515, 517, 518, that "the peculiar privilege given [to street railway companies] is the right, not to acquire land or an easement in land, but only the right, as long as permitted by certain municipal authorities, to lay tracks in streets already appropriated to the uses of public travel." So in *Springfield* v. *Springfield Street Railway*, 182 Mass. 41, 48, it was said that grants to street railway companies of locations in the public ways are in the nature of a privilege or permit to use the public ways given by cities and towns by virtue of authority from the Legislature. And the court added, "They are analogous to licenses given to run omnibuses along certain routes, though, of course, to make the analogy complete the omnibuses would have to be built so as to run on rails laid in the streets. . . . They convey no exclusive rights in the highways or streets in which they are granted, but are to be used in common with others having occasion to use the public ways. The public authorities retain in the main full control over the streets or ways in which they exist, and may revoke the locations or alter or discontinue the ways without liability to damages therefor, and subject only to such limitations, if any, as the Legislature may see fit to impose." See to the same effect *Union Railway* v. *Mayor & Aldermen of Cambridge*, 11 Allen, 287. And as a bare license may at any time be revoked or terminated by the licensor, so the licensee is at liberty at any time to cease wholly to avail himself of the permission given and to discontinue his action thereunder, unless there has been some agreement to the contrary. This was the doctrine maintained in Montana and Texas in cases not unlike the one before us. *State* v. *Helena Power & Light Co.* 22 Mont. 391. *San Antonio Street Railway* v. *State*, 90 Texas, 520, reversing *S. C.* 10 Tex. Civ. App. 12, and 38 S. W. Rep. 54. To the same effect is *York & North Midland Railway* v. *Queen*, 1 El. & Bl. 858. But there is nothing either in the respondent's charter or in that of its predecessor, or in any other statute before 1891, or in the grant of any location, to the effect that the line in question shall be continued in operation. And the view that, just as these locations might be revoked by the municipal authorities, (*Medford & Charlestown Railroad* v. *Somerville*, 111 Mass. 232,) so they might be abandoned or their use discontinued by the railway com-

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pany, finds support in legislation. The first general street railway enactment was St. 1864, c. 229; and § 19 of this act provided that "if a street railway company voluntarily discontinues the use of any part of its tracks for a period of six months, the streets or highways occupied by the same shall, upon the order of the board of aldermen of the city or the selectmen of the town, forthwith, at the expense of said company, be cleared of said tracks, and put in as good condition for the public travel as they were in immediately before being so occupied." After the passage of this statute, the commissioners appointed under c. 86 of the Resolves of 1864, in their report to the Legislature of 1865 (House Docs. of 1865, No. 15), called the attention of the Legislature to this subject by saying, "It does not seem to us that any further legislative provision in regard to allowing railway corporations to discontinue the use of their track in any street is demanded. As their rights in the streets . . . are of the most precarious nature, we suppose it cannot fairly be claimed that the companies have incurred any duty or obligation to continue the transportation of passengers longer than it proves remunerative." The fact that, after the Legislature had received this report, the provisions of St. 1864, c. 229, § 19, were substantially re-enacted in later codifications certainly tends to show that the Legislature considered that, subject to the provisions of their charters and other statutes, street railway companies might voluntarily discontinue in whole or in part the use of their tracks. See St. 1871, c. 381, § 25; Pub. Sts. c. 113, § 25; R. L. c. 112, § 36; St. 1906, c. 463, Part III. § 76.

Some limitations have indeed been put by later statutes upon the formerly unrestrained power of location by municipal officers, and the power of final action has been conferred upon other public officers. St. 1898, c. 578, § 17. R. L. c. 112, § 32. St. 1906, c. 463, Part III. § 66. But it still remains true that an ordinary street railway company holds its locations upon the public ways without having any estate of its own in the lands.

But this right was of course subject to legislative control. *Brownell* v. *Old Colony Railroad*, 164 Mass. 29. In 1891 it was enacted that "Whenever in the opinion of the railroad commissioners additional accommodations for the travelling public are required upon any street railway, they may, after due notice to

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the street railway company and hearing thereon, make such order requiring additional accommodations to be provided as they think justice to all parties concerned requires, and they may alter, revoke or renew the same. . . . Any street railway corporation which neglects to comply with any such order for more than one week after it receives notice thereof in writing shall forfeit" a sum stated. St. 1891, c. 216, re-enacted with slight verbal changes in St. 1906, c. 463, Part III. § 97. After the enactment of this statute and under the provisions of Pub. Sts. c. 112, §§ 14, 17, either the municipal officers or twenty or more legal voters of a city or town within which part of any street railway was located could, if the public accommodation so required, obtain an order from the board that the railway company should furnish such additional accommodations as were needed upon its railway, including of course any part thereof of which the company had chosen to discontinue the operation; for we cannot doubt that, so long at least as the tracks remained in the street, they were still a part of the company's street railway. One effect accordingly of this statute was to make the company's discontinuance of the use of any portion of its tracks subject to the investigation and control of the board of railroad commissioners in the manner provided for; but otherwise the power of the company remained unaffected. In this case the board has made no order.

In passing upon this question we have not found much assistance from the decisions of the courts of other States, either as to railroad or street railway companies, which have been called to our attention by the industry of the petitioners' counsel. Many of them turned upon the mandatory language of the charters or other statutes or of the ordinances which were before the courts. *Union Pacific Railroad* v. *Hall*, 91 U. S. 343. *State* v. *Hartford & New Haven Railroad*, 29 Conn. 538. *Mayor* v. *Dry Dock Railroad*, 133 N. Y. 104. *Flint & Père Marquette Railroad* v. *Rich*, 91 Mich. 293. *Potwin Place* v. *Topeka Railway*, 51 Kans. 609. *People* v. *St. Louis, Alton & Terre Haute Railroad*, 176 Ill. 512. Undoubtedly a valid requirement in an order of location would be enforced, *Selectmen of Gardner* v. *Templeton Street Railway*, 184 Mass. 294, but no such question is before us. Other cases relied on by the petitioners were decided upon the ground that the

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property of a railroad company is charged with the public duty and held subject to the trust to carry out the objects of its charter. *Gates* v. *Boston & New York Air Line Railroad*, 53 Conn. 333. *Pierce* v. *Emery*, 32 N. H. 484. *State* v. *Dodge City, Montezuma & Trinidad Railway*, 53 Kans. 377. Others were cases in which a company sought to retain a part of its franchise or of some particular location while abandoning the rest of it. *People* v. *Albany & Vermont Railroad*, 19 How. Pr. 523, and 24 N. Y. 261. *Bridgeton* v. *Bridgeton & Millville Traction Co.* 33 Vroom, 592. *People* v. *Louisville & Nashville Railroad*, 120 Ill. 48. *State* v. *Spokane Street Railway*, 19 Wash. 518. But here the respondent has discontinued its use of the whole of the tracks covered by the locations under which they were built. And *State* v. *San Antonio Railway*, 38 S. W. Rep. 54; 10 Tex. Civ. App. 12, has, as we have already seen, been reversed in 90 Texas, 520.

We may add that it would be difficult, in the absence of statutory requirement, to reach the conclusion that a street railway company with so small a capital and resources so limited as those shown here should be required to operate a branch line which is not an integral part of its main system, and which has not sufficient patronage to meet its running expenses. If it were a steam railroad, it would not be required, under the decision in *Commonwealth* v. *Fitchburg Railroad*, 12 Gray, 180, to run passenger trains on such a branch; but in the case of a street railway, which does not carry freight, this means the complete disuse of its tracks. Substantially this rule was affirmed in *Sherwood* v. *Atlantic & Danville Railroad*, 94 Va. 291, and in *Jack* v. *Williams*, 113 Fed. Rep. 823. See also *Ohio & Mississippi Railway* v. *People*, 120 Ill. 200; *People* v. *Rome, Watertown & Ogdensburgh Railroad*, 103 N. Y. 95. The general rule for such cases was stated by Gray, J., in *Northern Pacific Railroad* v. *Dustin*, 142 U. S. 492, 499: "If, as in *Union Pacific Railroad* v. *Hall*, 91 U. S. 343, the charter of a railroad corporation expressly requires it to operate its railroad as a continuous line, it may be compelled to do so by mandamus. So if the charter requires the corporation to construct its road and to run its cars to a certain point on tidewater (as was held to be the case in *State* v. *Hartford & New Haven Railroad*, 29 Conn. 538), and it had so constructed

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its road and used it for years, it may be compelled to continue to do so. And mandamus will lie to compel a railroad corporation to build a bridge in compliance with an express requirement of its charter. *New Orleans, Mobile & Texas Railway* v. *Mississippi*, 112 U. S. 12. But if the charter of a railroad corporation simply authorizes the corporation without requiring it to construct and maintain a railroad to a certain point, it has been held that it cannot be compelled by mandamus to complete or maintain its road to that point when it would not be remunerative. *York & North Midland Railway* v. *Queen*, 1 El. & Bl. 858. *Great Western Railway* v. *Queen*, 1 El. & Bl. 874. *Commonwealth* v. *Fitchburg Railroad*, 12 Gray, 180. *State* v. *Southern Minnesota Railroad*, 18 Minn. 40."

We cannot say that the respondent's discontinuance of this line was "without right or lawful excuse" within the meaning of the statute; and it is not necessary to consider the exceptions taken by the respondent to the master's report. The petition must be dismissed.

So ordered.

JAMES ROSS *vs.* HENRY C. SCHRIEVES.

Suffolk. April 8, 1908. — June 16, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Evidence, Opinion: expert. *Damages*. *Practice, Civil*, Exceptions.

At the trial before a jury of an action of tort to recover for the alleged conversion of shop furniture of such a nature that its value is not to be presumed to be within the knowledge of all the jurors, a witness who is acquainted with similar property and its value and has the requisite knowledge and experience may be examined by hypothetical questions, although he has not seen the particular furniture to which the trial relates.

Where, by a bill of exceptions which contained an exception to a refusal by the judge presiding at a trial to allow a question to be put to a witness, it did not specifically appear what the answer expected by the excepting party was, nor that he expected that the answer would be favorable to him, nevertheless, if it does appear that the ruling was made irrespective of what the answer might be and upon the assumption that the answer would have been helpful to the excepting party, the exception must be sustained if the ruling was wrong.

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TORT for the alleged conversion of barber shop furniture and a billiard table and fittings. Writ in the Municipal Court of the City of Boston dated May 15, 1905.

On appeal the case was tried before *Lawton*, J. There was a verdict for the plaintiff. The only exception was to the exclusion of certain evidence offered by the defendant as stated in the opinion.

The case was submitted on briefs.

T. I. Hogan, for the defendant.

C. H. Stebbins, O. Storer & C. E. Burbank, for the plaintiff.

KNOWLTON, C. J. The question of law raised by this bill of exceptions is whether, upon a question as to the value of the furniture of a barber shop converted by the defendant, an expert witness whose special business is determining the value of such property and trading in it may be examined as to values by hypothetical questions, he never having seen the particular articles converted.

In *Miller* v. *Smith*, 112 Mass. 470, 475, Chief Justice Gray said: "Whenever the value of any peculiar kind of property, which may not be presumed to be within the actual knowledge of all jurors, is in issue, the testimony of witnesses acquainted with the value of similar property is admissible, although they have never seen the very article in question. . . . A witness, having the requisite knowledge and experience, may always be examined by hypothetical questions, even if he has not seen the particular subject to which the trial relates, and has not heard all the other evidence given in the case." These propositions were supported by a citation of authorities. They show that the testimony was competent in the present case.

The plaintiff refers to the familiar rule that an exception to an erroneous ruling cannot be sustained unless it appears that the excepting party was injured by it. The bill of exceptions indicates that this subject was not in the thought of the counsel or of the judge when the ruling was made. The colloquy recited in the bill of exceptions makes it plain that the judge, as well as the counsel on both sides, assumed that the testimony which the defendant sought to introduce was expected to be favorable to him. The ruling seems to have been made solely on the ground that a witness, who had not seen the goods, could not answer a

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hypothetical question in regard to the value of them. Before the question had been finished the judge interrupted the defendant's counsel by asking, "Are you going to ask him a hypothetical question?" When later, for the purpose of perfecting his exception, the counsel was about to finish the question, the judge said: "True, but he said he had never seen the goods, and you are going to ask him to give a value on them. . . . I think that is enough for a foundation to warrant my excluding it." Previously, in reference to answering a hypothetical question, the judge said: "It may be your misfortune that you cannot get any other testimony, but I do not think I can allow that." While the case would have been free from doubt if the defendant's counsel had expressly stated his reason to expect a favorable answer from the witness, we think the record shows an assumption by the judge that the testimony would be helpful to the defendant, and an understanding by the defendant's counsel that this was assumed, and that his exception was saved and allowed accordingly. If this sufficiently appears in the bill of exceptions, the defendant is entitled to the benefit of the assumption in this court.

Exceptions sustained; new trial granted on the question of damages.

HIGHLAND FOUNDRY COMPANY *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. March 9, 10, 1908. — June 17, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Railroad, Liability for injury caused by fire communicated from locomotive. *Practice, Civil*, Judge's charge, Verdict. *Jury and Jurors.*

At the trial of an action of tort against a railroad corporation to recover for damages alleged to have been sustained by reason of a building of the plaintiff having been set fire to by a spark communicated from a locomotive engine of the defendant, the plaintiff contended that such spark might have entered the building in any one of three ways, and the defendant requested that a verdict be directed for it, and excepted to a refusal of the presiding judge to grant the request. There was a verdict for the plaintiff. This court, without review-

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ing the evidence in detail, *held*, that there was evidence from which the jury were warranted in finding that a spark might have entered the plaintiff's building from the defendant's locomotive in either of two of the ways suggested by the plaintiff, and overruled the defendant's exception.

The trial of an action of tort against a railroad corporation to recover for damages alleged to have been sustained by reason of a building of the plaintiff having been set fire to by a spark communicated from a locomotive engine of the defendant lasted a week, and was given to the jury at 2.30 P. M. on a certain day. The jury remained in continuous session until 10.30 the next morning, when they returned into court and requested further instructions from the judge on points of law. The judge, after stating to them the importance to the litigants of their reaching a verdict, continued: "I need not say to you, as has been said in other cases, that you can decide it as well as anybody else can; of course you can. . . . To say that you cannot decide this case is to say that another jury of twelve men cannot do it; and justice will be defeated in the end if that is so, as you understand. Therefore it is almost a necessity that you should come to some reasonable conclusion upon this case. And of course, in coming to that conclusion, it is a give and take argument that you make, necessarily. You are not to report to me, when you come in here, twelve individual verdicts. You are to give a verdict which, on the principle of give and take, represents the consensus verdict of you as a unit, as a body of men. Supposing you were sitting together as a board of directors in a corporation, and should fight over your policy. . . . In some way, you have to adjust your differences; you have to come to some conclusion in the end which will permit the business to go on. Now you can do that just as well here, and a good deal better, as representing somebody's else business, than you could if it were your own business, because your pocketbook is not interested. . . . We do not care anything about individuals or individual pocketbooks or individual interests. But we are absolutely desirous that so far as our minds go we shall be mentally honest, and we are absolutely desirous that right shall come out of these hearings, absolute right, so far as we can see it." *Held*, that the charge was erroneous in seeming to urge the importance of an agreement among the jurors by a compromise of their honest individual opinions, and in failing to make sufficiently prominent the idea that the verdict should be the conscientious verdict of each juror.

TORT to recover for damages resulting to the plaintiff from a fire in its foundry alleged to have been caused by a spark from a locomotive of the defendant. Writ in the Superior Court for the county of Suffolk dated October 18, 1899.

There was a trial before *Pierce*, J., and a verdict for the plaintiff in the sum of $12,173. The defendant alleged exceptions.

The facts are stated in the opinion.

C. F. Choate, Jr., for the defendant.

E. P. Saltonstall, (*P. G. Bolster & C. W. Blood* with him,) for the plaintiff.

HAMMOND, J. The first question in this case is whether the

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evidence was sufficient to warrant a finding that a spark from a locomotive of the defendant caused the fire which damaged the property of the plaintiff.

It seems to be conceded on all sides that the fire did not first appear upon the outside of the building. And the only possible ground upon which it can be contended that the fire was started by a locomotive spark is that the spark entered the building and started the fire on the inside. It is strongly argued by the defendant that in view of the nature and location of the fire and the construction of the building this fire could not have been started by a spark coming from the outside. On the contrary the plaintiff contends that a spark might have entered the building in either one of three ways, either through the south ventilator, the north ventilator or the crack in the roof. A discussion of the bearing and weight of the evidence would require a long, detailed description of the construction of the building and the ravages and location of the fire. We have carefully considered all the evidence. The case is very close. If the plaintiff's case rested upon the theory that the spark came down through the south elevator, we should say that the evidence is not sufficient to sustain it, and that a verdict should have been ordered for the defendant. But as respects the north ventilator or the crack in the roof we do not think it can be ruled as matter of law that a spark could not have entered by the way of either into the pattern room and have caused such a fire as appears to have occurred.

There was evidence from which the jury might properly have concluded that sparks were occasionally emitted from the defendant's engines, and that the direction and force of the wind on the day of the fire were such as to carry such sparks towards the pattern room where the fire originated. The evidence of the plaintiffs tended to show, moreover, that there was no reasonable probability that the fire originated from any cause connected with the nature of the buildings, the management of the business or with the acts, negligent or otherwise, of the workmen or other persons in and about the factory. In view of these circumstances in connection with the other evidence the jury may have come to the conclusion that the only reasonable explanation of the fire was that it had its origin in a spark from

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a locomotive belonging to the defendant. We cannot say as matter of law that such a conclusion was not warranted by the evidence. See among other cases, *McGinn* v. *Platt*, 177 Mass. 125; *St. Louis, Iron Mountain & Southern Railway* v. *Dawson*, 77 Ark. 434; *Gibbons* v. *Wisconsin Valley Railroad*, 66 Wis. 161; *Wilson* v. *Northern Pacific Railroad*, 48 Minn. 519.

But we are of opinion that the defendant has reasonable cause to complain of the instructions given to the jury, and that for that reason the exceptions must be sustained. After a trial lasting several days, the case was given to the jury at half past two o'clock in the afternoon of June 11, 1907. They remained out until half past ten in the morning of June 12, when they returned into court requesting further instructions on points of law. Before proceeding to give these further instructions the presiding judge addressed the jury in the following language: "Gentlemen, I am extremely sorry that the exigencies of this case require that you should be put to this trouble and discomfort. But we have been trying the case a week, as you know, and it is a matter of very great importance to all persons concerned that this should be decided now, and not go over for a long time, with the possible loss of further testimony as the months and years roll by, the loss of the use of the money, if the verdict should be for the plaintiff, and all things that you may naturally think of which make it a hardship that this case should not be decided. I need not say to you, as has been said in other cases, that you can decide it as well as anybody else can; of course you can. You are just as able, as mentally strong and as honest as any jury that will be ever gathered together again in this court; and to say that you cannot decide this case is to say that another jury of twelve men cannot do it; and justice will be defeated in the end if that is so, as you understand. Therefore it is almost a necessity that you should come to some reasonable conclusion upon this case. And of course, in coming to that conclusion, it is a give and take argument that you make, necessarily. You are not to report to me, when you come in here, and to the court, twelve individual verdicts. That is not what you will have. You are to give a verdict which, on the principle of give and take, represents the concensus verdict of you as a unit, as a body of men. Supposing

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you were sitting together as a board of directors in a corporation, and should fight over your policy, you know that if you all stood out and some man said, 'Why, I will not sell this unless I get so much,' and another man said he wouldn't sell unless he got something else, and they wouldn't do this or they wouldn't do that, the corporation would soon become insolvent; it would come to a stop. In some way, you have to adjust your differences; you have to come to some conclusion in the end which will permit the business to go on. Now you can do that just as well here, and a good deal better, as representing somebody else's business, than you could if it were your own business, because your pocketbook is not interested. It is a matter of entire indifference to you, of course, as to whether one man, as a man, recovers; just as it is a matter of indifference to me, in the determination of these cases, as to who recovers. I do not care a cent about that; I am utterly indifferent, just as I know you are, except that we are both anxious that the right shall prevail. That is all we are here for. We do not care anything about individuals or individual pocketbooks or individual interests. But we are absolutely desirous that so far as our minds go we shall be mentally honest, and we are absolutely desirous that right shall come out of these hearings, absolute right, so far as we can see it."

It is argued by the plaintiff that these remarks were strictly within the line of propriety, and in support of that contention counsel have cited *Commonwealth* v. *Tuey*, 8 Cush. 1, *Commonwealth* v. *Whalen*, 16 Gray, 25, *Commonwealth* v. *Poisson*, 157 Mass. 510, *McCoy* v. *Jordan*, 184 Mass. 575. There is perhaps no case in our reports more familiar to those, whether on the bench or at the bar, who are engaged in the trial of jury cases, than *Commonwealth* v. *Tuey*. It is often quoted or read to juries slow in coming to a verdict, and many times with salutary effect. But it generally has been regarded by the profession as going nearly if not quite to the extreme limit. The charge to which exception was taken in that case was made in a trial in the Court of Common Pleas, by a judge who afterwards became a conspicuous judge of this court, and who enjoyed the reputation of being one of the most accomplished jurists of the Commonwealth. In delivering the charge he was treading on

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delicate ground, and evidently was aware of that fact. His words seem to have been chosen with great care. He stated to the jury that the case must at some time be decided and that there was no reason to suppose that the case ever would be submitted to any more impartial or competent jury than they were, or that clearer evidence would be produced, and that it was their duty to decide the case if they could conscientiously do so. He further said that in conferring together they "ought to pay proper respect to each other's opinions, and listen, with a disposition to be convinced, to each other's arguments." But at the same time he was careful to say that "the verdict to which a juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows." In overruling the exceptions this court, speaking through Bigelow, J., said: "The instructions went no further, than to say, that if any of the jury differed, in their views of the evidence, from a large number of their fellows, such difference of opinion should induce the minority to doubt the correctness of their own judgments, and lead them to a reëxamination and closer scrutiny of the facts in the case, for the purpose of revising and considering their preconceived opinions. In this view, the court did nothing more than to present to the minds of the dissenting jurors a strong motive to unanimity." In short, while the jury were told that in coming to a conclusion as to the merits of the controversy submitted they might take into consideration the importance of a verdict, and their duty to reach one if they consistently could, and that they also should pay due respect to the opinions of others, yet they were carefully told that "the verdict to which a juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows."

We think the charge in the case before us went much further than *Commonwealth* v. *Tuey*. In the present case the jury were told not only that they could decide the case "as well as anybody else can," but also that "to say that you cannot decide this case is to say that another jury of twelve men cannot do it; and justice will be defeated in the end if that is so, as you understand. Therefore it is almost a necessity that you should come to some reasonable conclusion upon this case. And of

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course in coming to that conclusion, it is a give and take argument that you make, necessarily. You are not to report to me, when you come in here, and to the court, twelve individual verdicts. . . . You are to give a verdict which, on the principle of give and take, represents the consensus verdict of you as a unit, as a body of men." Then follows the illustration as to the manner in which the board of directors of a corporation conduct business. It is true that at the end he says that they should be "honest" and "desirous that right . . . [should] . . . come out these hearings, absolute right, so far as we can see it." But taking the charge as a whole we think that it puts the pressure on too hard, and fails to make sufficiently prominent the idea that after all the verdict should be the conscientious verdict of each juror. The ordinary juror in listening to this language may well have been led to believe, not simply that in making up his own mind he should give due weight to the opinions of his fellows, but that such was the necessity of agreement upon a verdict that he was justified in making some kind of a compromise between his own conscientious convictions and those of his fellows. We do not for a moment entertain the idea that it was the intention of the presiding judge to impress the jurors with any such thought. The trial had lasted a week; the question to be decided by the jury was close and likely to lead to difference of opinion; it was important for the interests of all concerned that a verdict should be reached if possible, and the words were addressed to a jury probably much fatigued by the deliberation of twenty hours. Under these circumstances the learned judge was suddenly called upon for further instructions. He thought that he would improve the opportunity to say a few words about the importance of reaching a verdict, and with his mind fastened upon that idea he failed to realize the full force of his extemporaneous words and the interpretation likely to be given to them by a weary jury.

Exceptions sustained.

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ARTHUR D. FLANSBERG *vs.* HEYWOOD BROTHERS AND WAKEFIELD COMPANY.

Suffolk. March 10, 11, 1908. — June 17, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Negligence.

If the duties of a freight brakeman, who is riding upon the side of a freight car moving slowly in a yard crowded with piles of merchandise, require him to turn his back toward the direction in which the car is moving, this does not relieve him from the duty of exercising care for his own protection, even if under these conditions he is not required to give more attention than usual to his personal safety.

HAMMOND, J. The verdict for the plaintiff which was given at a former trial of this case was set aside upon the ground that the plaintiff had not shown that he was in the exercise of due care. 190 Mass. 125. At the second trial the judge ruled that the plaintiff was not entitled to recover, and ordered a verdict for the defendant; and the case is before us upon the plaintiff's exceptions.

It is argued by the plaintiff that the evidence at this second trial differs from that given at the first and is more favorable to him, and that he was entitled therefore to go to the jury. We have carefully collated the evidence at the two trials, and we can find no valid ground for distinction on this question of the plaintiff's due care. The salient feature of the case is that the plaintiff was approaching a dangerous place and knew it. While there is evidence that he did not know of the existence of this pile of rattan by which he was struck, and while the view of it was somewhat shut off by the porch of the wooden building, yet it is perfectly plain that if he had looked sooner than he did he could have seen it in time to escape injury. He was riding with his back toward the direction in which he was going. Even if his duties required him to ride that way, to a certain extent he was not thereby relieved from the duty of exercising care. Indeed it would seem as if when riding that way he would be required in a certain sense to be more attentive for his personal safety.

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In the opinion given when the case was here before, Knowlton, C. J., said: "He [the plaintiff] easily could have stepped from the car at any time, as it was moving very slowly. He had been warned of the width of the car by the remark of the conductor, as well as by his own observation. The danger of riding on the side of such a car, in a yard generally so crowded with rattan, often piled upon the ground, and with buildings very near the track, called for great care, even if the plaintiff had not seen the pile which he afterwards encountered. In view of the conditions which the plaintiff knew, or would have known if he had exercised due care, we are of opinion that nothing appears in the evidence which justified him in riding on the side of this car without looking forward in time to see if there were obstructions with which he might come in contact. There was no evidence that he was in the exercise of due care."

These remarks are still as applicable to the case of the plaintiff as now presented as they were to the case as presented at the first trial.

Exceptions overruled.

A. H. Russell, for the plaintiff.

W. I. Badger, (*W. H. Hitchcock* with him,) for the defendant.

MARY A. HILL *vs.* TRYPHENIA N. HAYES.
FREDERICK P. HILL *vs.* SAME.

Suffolk. March 19, 1908. — June 17, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Landlord and Tenant, Liability of landlord to third person. *Covenant of Lessee. Nuisance. Practice, Civil*, Issues for jury.

If the owner of real estate leases it with a nuisance upon it, of which he knows or ought to know, and takes no agreement from the tenant to abate the nuisance, he is liable to a third person who when exercising due care suffers injury from the nuisance.

In an action against the owner of a building leased to a tenant, for personal injuries caused by the defective condition of the cover of a coal hole in the sidewalk adjoining the defendant's building and used in connection with it, where it is material for the plaintiff to show that the defect existed at the time the lease

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was made, and no one testifies from actual observation made at that time as to the condition of the coal hole then, the plaintiff can show its defective condition before the time of the letting and that this condition was substantially the same up to the time of the accident.

If the owner of a house leases it when the coal hole in the adjoining sidewalk used in connection with the house is in such a condition as to constitute a nuisance, and there is no way to make the coal hole proper and safe for travellers except by putting in a new casting or covering or a new pin, and the owner through his agent, having been notified of the defective condition of the coal hole, makes an attempt to have it repaired but does not furnish a new cover or a new pin and leaves it in a condition dangerous for public travel, and the lease contains no provision requiring the tenant during the term to put or keep the premises in any condition other than that in which they were at the beginning of the term, the owner is liable to a traveller who in the exercise of due care is injured from falling into the coal hole by reason of the defective cover.

Where a lease contains a covenant by the lessee that he will keep the premises in as good condition as they are in at the commencement of the term or may be put in by the lessor during the continuance thereof, and also covenants that he will at the expiration of the term "yield up" the premises to the lessor "in good tenantable repair in all respects, reasonable wear and use thereof and damage by fire and other casualties excepted," the last named covenant does not impose upon the lessee the duty of keeping the premises in good tenantable repair during the term. It is fulfilled if they are yielded up in that condition at the end of the term, and, if there is a nuisance on the premises at the time the lease is made, this covenant does not require the lessee to abate it until at least just before the end of his occupancy.

It is within the discretion of a presiding judge to submit proper special questions to the jury.

HAMMOND, J. These two actions were tried together. In the first the plaintiff sought damages for injuries suffered from a fall into a coal hole in a sidewalk adjoining land of the defendant; and in the second her husband sought to recover damages for the loss of his wife's services by reason of the fall. After a verdict for the plaintiff the case is before us upon exceptions taken by the defendant at the trial. The exceptions are the same in each case, and, since the second case must stand or fall with the first, we shall speak only of the first. No question seems to have been made about the plaintiff's due care. The real controversy arose as to whether the coal cover was defective so as to make the spot dangerous to public travel, and whether if it was, the defendant was answerable.

The coal hole was used in connection with the premises of the defendant which at the time of the accident which occurred on May 8, 1903, were, and for more than two years before that had been occupied by one Howard as a tenant of the defendant.

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The jury were distinctly and carefully told that in order for the plaintiff to recover she must show (1) that the premises were defective with respect to the coal hole at the time they were leased to Howard, which was January 8, 1901, and that they were defective with respect to the coal hole so as to be dangerous to public travel, (2) that they remained "that way" up to the time of the accident, and (3) that the defendant knew it or ought to have known it; and that a failure of the plaintiff to prove any of these three propositions would be fatal to her case. The jury were further instructed that as bearing upon the question whether the defect, if any, had remained the same continuously up to the time of the accident they might consider the evidence as to the repairs in 1901. At the close of the charge four questions were submitted to them to be answered in the event that they found for the plaintiff. It appears by the written answers that the jury found that at the time of the lease to Howard the coal hole being within the street limits was in such a condition as to constitute a nuisance, that there was no "way to make the coal hole proper and safe for travel except to put in a new casting or covering, or a new pin," that the defendant or her agent made an attempt to have it repaired, but that such attempt did not make it safe for travel.

The first contention of the defendant is that there was no evidence tending to prove the first proposition above named, namely, that at the time the premises were leased to Howard the nuisance existed. Upon this the case is close. Nobody testified from actual observation made at that time as to its condition then, and the plaintiff was compelled to resort to other evidence. She undertook to prove this part of her case by showing, so far as she could, the condition of the coal hole from a time antedating the lease up to the time of the accident, as bearing upon its condition at the time of the letting.

The lease, as before stated, was made on January 8, 1901. Harriet M. Brown testified that she occupied these premises from April, 1899, to January 1, 1900; that during that time she remembered but one coal hole, the one in front of the front steps; that this coal hole was called to her attention because of the fact that "it sort of cracked when you stepped on it, or perhaps you would say rattled"; that "it was so right straight

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along." Mildred P. Stomm testified that she went to live on the premises in December, 1900, and stayed there two years and a half; that "she had examined and noticed the coal hole, . . . that shortly after she went to live there she noticed the coal hole rattled; that it was loose; that . . . some time in 1901, in the early fall, . . . the next day after a little girl had stepped into the coal hole she examined the coal cover": that "the cover was broken"; . . . that at this time there was no pin through the two little ears on the rim of the coal cover; that she kicked it up; stepped on the side of it, and it would slide out of the rim." She further testified that on the same day she told Mr. Gulesian (who was the person to whom the rent was paid and whom the jury might have found to be the agent of the defendant) that a little girl had stepped into the coal hole "and would he attend to having it repaired; that he said he would; that that night there was some one there who did something to the coal hole cover; that after that she noticed it rattled and noticed how it was repaired; that it was repaired by hanging a weight on the bottom on the lower side; that the weight was attached to the cover by a string; . . . that from that time up to May, 1903, she observed this cover very frequently; that during that time she did not notice any change in its condition; that on May 8, 1903, she made an examination of the cover and noticed there was no pin there." 'Charles M. Howard, to whom the lease was given in January, 1901, testified that he lived on the premises from December, 1900, to November, 1903; that the coal hole "was called to his attention during the first year he was there; that it rattled a little; that during the first year at some time he examined it and saw that it was rather loose; that the bolt or rod that went through the hinge was not in place and that the cover was loose and rattled; that there was nothing to hold the cover down; that some time afterward there was a weight put on it; . . . that he took a lantern and looked at it from beneath; that whenever he was at home and there was coal put into the cellar he would take care of the hole and would look after it, as he was afraid somebody might get in there; that quite often he went out with the tea kettle and thawed the ice around it, and saw that it was in place, and that at those times there was no pin there; that while he was there he never ordered

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any repairs down on the coal hole and never paid for any; that after May 8, 1908, he examined the cover and that he found the same conditions; that it wasn't tight and was loose and there was no pin there."

There was evidence that one Miss Walley fell into the hole in September, 1901; that the cover tipped up as she stepped upon it. Albert Moran, a policeman, testified that after the accident he went with Mr. Hill to this coal hole and examined the cover closely; that Mr. Hill "trod on it and pushed it, and the effect of his treading and pushing was to push it out of place; that he [the witness] tried it two or three times but didn't push it out of place; that there was a certain place on the right side of it that you had to touch." The evidence as to whether the cover was cracked and whether it rattled was conflicting. But no witness testified to ever seeing the pin, if any there was, in its proper place.

It is unnecessary to review in detail the evidence as to the mechanical structure of this cover. It is sufficient to say that it warranted a finding that the only way to make the coal hole proper and safe for travel was to put in a new casting or covering, or a new pin.

Upon all the evidence we think that the jury were warranted in finding that while a person might step upon the cover and not displace it, still, if one stepped upon a certain part of it, it was likely to fly up and was therefore dangerous to public travel; that this was the condition at the time the premises were leased to Howard; and that this condition was substantially the same up to the time of the accident.

It does not appear that at or before the time of the letting the defendant ever made or caused to be made any examination whatever of the coal hole; and the jury were warranted in finding that in view of the danger to the public, the construction of the coal cover, and its "rattling" symptoms, the defendant knew, or in the exercise of due care would have known, the condition.

We have then a case where a landlord negligently lets premises, abutting upon a way, which are from their condition dangerous to persons lawfully using the way, and where the danger consists not in the way the premises are used by the tenant but

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in the permanent condition of the premises. It is not a case like *Frischberg* v. *Hurter*, 173 Mass. 22, where the cover itself was in good condition but the tenant failed to fasten it properly. It must be classed with cases like *Dalay* v. *Savage*, 145 Mass. 38.

Nor does the lease take the case out of the rule. It is to be noted that the lease was for one year with a right in the lessee to extend it for an additional term of two years upon giving notice to the lessor. The legal effect was that the term was either one or three years at the option of the lessee. While there does not appear any direct evidence that the lessee gave the formal notice required by the lease, still the defendant testified that neither at the end of the first year, nor just before, nor just after, did the lessee say anything about the expiration of the lease or have any talk with her "about the tenancy other than is expressed in the lease." The case appears to have been tried, by the defendant at least, upon the theory that the term had been extended the additional two years, so that at the time of the accident Howard was in as tenant under the lease. In the defendant's brief it is said as a part of the statement of the case that at the time of the accident the premises were "under the control of one Charles M. Howard who held under a lease," which is the lease in question. As this is manifestly the view most favorable to the defendant, we assume in her favor that at the time of the accident to the plaintiff, Howard the tenant was in control of the premises under this lease.

The lessee did not agree to keep the premises in any other condition than that in which "the same are in at the commencement of the term, or may be put in by the said lessor or her representatives during the continuance thereof." It is true that the lessee covenants that he will at the expiration of the term "yield up" the premises to the lessor "in good tenantable repair in all respects, reasonable wear and use thereof and damage by fire and other casualties excepted." But this last covenant does not impose upon the tenant the duty of keeping the premises in a tenantable condition during the term. It is fulfilled if they are yielded up in that condition at the end of the term. Neither of these covenants calls upon the tenant to abate the nuisance until at least just before the end of the occupancy. See *Nugent*

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v. *Boston, Concord & Montreal Railroad*, 80 Maine, 62; *Reed* v. *Snowhill*, 22 Vroom, 162. It appears therefore that the defendant let the premises with a nuisance upon them and took no agreement from the tenant to abate the nuisance. She therefore must be held.

The exceptions to the admission of evidence must be overruled. The various descriptions of the coal hole were admissible as bearing upon its condition at the time of the lease, and also upon the question whether the same defect which existed at that time continued up to the time of the accident. The evidence in this connection of the conversation between the witness Stomm and Gulesian was admissible as bearing upon the question whether the repairs if any which followed upon that conversation were made by the defendant's authority or by third parties. It does not appear that the defendant excepted to the admission of any of the conversations between Mrs. Howard and Gulesian.

It was within the discretion of the presiding judge to submit to the jury proper questions, (*Boston Dairy Co.* v. *Mulliken*, 175 Mass. 447,) and these questions were proper.

At one time during the charge the presiding judge said that if the defect existed at the time of the lease and the defendant knew it then or subsequently, she would be liable. To this the defendant excepted. The answer to this exception is that in a subsequent part of the charge this statement was withdrawn so far as it permitted the defendant to be held simply by reason of knowledge acquired after the letting, and the case was finally sent to the jury under the instructions stated in the early part of this opinion.

We see no error in the way in which the judge dealt with the twenty-nine rulings requested by the defendant. It will serve no useful purpose to go over them in detail. The law governing the case was plainly stated to the jury in a manner sufficiently favorable to the defendant, and the instructions were sufficiently full. In each case the order must be

Exceptions overruled.

D. V. McIsaac, for the defendant.

A. T. Smith, for the plaintiffs.

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WILLIAM T. McRAE *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. March 26, 1908. — June 17, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Pleading, Civil, Answer. *Limitations, Statute of. Employers' Liability Act. Negligence*, Employer's liability.

A defense which affects only the remedy, such as a statute of limitation, must be pleaded as a matter of avoidance, and is waived by an answer containing only a general denial.

Under our practice act a general denial puts in issue all facts which the plaintiff must prove to establish his right to recover, whether such facts are alleged in the declaration or not.

The provision of R. L. c. 106, § 75, that an action under the employers' liability act must be brought within one year after the accident which causes the injury or death, is not a mere statute of limitation, but states a condition precedent to a right of action under the act, and accordingly the defense that such an action was brought more than a year after the accident is open to a defendant whose answer contains only a general denial.

HAMMOND, J. This is an action of tort to recover for personal injuries caused to the plaintiff by a fall. The declaration contained three counts, the first at common law, and the second and third under the employers' liability act. R. L. c. 106, § 71. The jury found for the defendant upon the first count, and for the plaintiff upon the second and third. The case is before us upon the defendant's exceptions.

One of the questions raised is whether the judge should have ruled as requested by the defendant that the plaintiff could not recover upon either the second or third counts. Upon this it appeared that the action was not brought until more than one year — nearly two years — after the accident occurred; and it is contended by the defendant that for that reason, if for no other, there can be no recovery upon these counts. As already stated, these counts are based upon R. L. c. 106, § 71. It is provided in § 75 of that chapter that "no action for the recovery of damages for injury or death under the provisions of §§ 71–74, inclusive, shall be maintained unless notice of the time, place and cause of the injury is given to the employer within sixty days, and the action is commenced within one year after the

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accident which causes the injury." If this provision as to the time within which the action may be brought is merely a statute of limitation affecting only the remedy, then it must be pleaded in the answer in order to be availed of as a ground of defense. Such a defense is regarded as a matter of avoidance because it admits a cause of action once to have existed. *Sawyer* v. *Boston*, 144 Mass. 470. *Emmons* v. *Hayward*, 11 Cush. 48. *Middlesex Company* v. *Osgood*, 4 Gray, 447. R. L. c. 173, §§ 24, 27. If not set up in the answer it is regarded as waived, and cannot be raised at the trial. In the case before us the answer was simply a general denial. If, however, the provision as to time is to be regarded as one of the conditions of the right to maintain the action, then the plaintiff must show as a part of his case that he has complied with the condition. And in such circumstances the contention of a defendant that this provision of the statute has not been complied with is not in the nature of avoidance, but a denial of one of the facts essential to the plaintiff's case. A general denial therefore in such a case raises the question. And that is so under our practice act, even if there is no allegation upon that matter in the declaration. *Davis* v. *Travis*, 98 Mass. 222. *Hill* v. *Crompton*, 119 Mass. 376.

Under the pleadings in this case it, therefore, becomes necessary to determine the nature of the provision in question. The kind of legislation finally ending in R. L. c. 106, §§ 71 *et seq.* began with St. 1887, c. 270; and, although this act had been amended several times, yet, inasmuch as this provision as to time has been continued all the way through substantially the same and must be regarded as having the same meaning throughout the whole legislation, it is useful to refer to the act.

This act greatly enlarged the rights of employees or their representatives to recover damages in case of injury or death. It gave a right of action where none would have existed at the common law, and it provided that "no action for the recovery of compensation for injury or death under this act shall be maintained, unless notice of the time, place and cause of the injury is given to the employer within thirty days, and the action is commenced within one year, from the occurrence of the accident causing the injury or death." Is this provision as to the

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one year simply a statute of limitation affecting only the remedy, or is it one of the conditions upon which the right of action depends? The question is narrow, and not entirely free from difficulty.

In support of the proposition that it is simply a statute of limitation, it may be argued that the provision presupposes the existence of a complete right of action after the notice is given for at least the rest of the year, and that at least to this right of action the clause in question is plainly not essential; that the language as to bringing an action after the expiration of the year is no stronger than may be found in the general statute of limitations, and that full effect is given to the clause if it be regarded simply as a provision shortening, in this particular action, the time usually allowed in actions for personal injuries from six years to one year; that such is the most natural construction, and that the statute being remedial should be liberally construed in favor of those to whom the new action is given.

But, notwithstanding these and other obvious considerations in the same line, we cannot adopt this view of the clause in question. It is to be noted that this clause is preceded by that as to notice, both clauses being in the same sentence. It has been settled that the clause relating to the notice is a condition precedent to the right of action, or in other words that the giving of the notice is one of the essential elements of the cause of action; and that where the declaration fails to allege the proper notice the question can be raised by demurrer. *Veginan* v. *Morse*, 160 Mass. 143, and cases cited. In this part of the statute the Legislature seems to be dealing with conditions upon which the right of action given in previous parts of the statute should be availed of. It imposes two conditions, one as to notice and one as to the time in which the action should be brought. The language as to the necessity for the existence of the one is the same as that with reference to the necessity for the existence of the other. One has already been declared to be a condition precedent. The right of action is created by the statute and is maintainable solely by its authority. In view of these considerations, we think that the same rule must be applied to the second condition as to the first, and that this limitation of time must be regarded not merely as a statute of limitation but as one of the

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conditions of a right of action. It forms one of two conditions, each of which is essential to the right of action. The right must be accepted and pursued under the conditions affixed to it. For cases in which a similar conclusion is reached upon statutes resembling our statute in this respect, see among others *Maylone* v. *St. Paul*, 40 Minn. 406; *Hill* v. *Board of Supervisors*, 119 N. Y. 344; *Hanna* v. *Jeffersonville Railroad*, 32 Ind. 113; *Taylor* v. *Cranberry Iron & Coal Co.* 94 N. C. 525; *Best* v. *Kinston*, 106 N. C. 205; *Elliott* v. *Brazil Block Coal Co.* 25 Ind. App. 592; *Stern* v. *La Compagnie Générale Transatlantique*, 110 Fed. Rep. 996, and cases cited. See also *Barker* v. *Palmer*, 8 Q. B. D. 9; *Johnston* v. *Shaw*, 21 Sc. L. R. 246. Where the facts appear in the declaration the question can be raised of course by demurrer. *Hill* v. *New Haven*, 37 Vt. 501, 511.

It follows that this defense was open to the defendant upon the general denial contained in its answer; and that the instructions requested by the defendant that the plaintiff could not recover on either the second or the third counts should have been given. The exceptions to the refusal to give these requests are sustained. The record shows no reason for disturbing the verdict on the first count. It becomes unnecessary to consider the defendant's other exceptions.

Exceptions sustained.

J. L. Hall, for the defendant.

M. A. Sullivan, (*B. R. Wilson* with him,) for the plaintiff.

ISRAEL BERUBE *vs.* FRED B. HORTON & another.

Suffolk. March 27, 1908. — June 17, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Negligence, Employer's liability. *Practice, Civil*, Amendment.

In an action by a carpenter against his employer for personal injuries caused by some small stones and mortar from the bottom of part of an old cellar wall falling upon him while he was working beneath the wall in shoring up the earthen sides of a cellar which was being excavated preparatory to the construction of a large office building, it appeared that the new cellar was to be considerably

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deeper than the old one, and that a part of the old wall, which was to be preserved and kept in position so as to form a part of the new wall, was braced by planks placed against its face, and was supported by a girder placed under it, the girder resting at each end upon parts of the new wall and in the middle upon an upright post, that this part of the old wall was made of mortar and rough granite stones, both great and small, and was two or three feet thick, that the girder supporting it was only from twelve to fourteen inches wide, so that about one half of the bottom of the wall projected over the girder, that the plaintiff, who was an experienced carpenter, was one of the night gang, that when he went to work that night he asked the "night boss" whether the old wall was "real secure," that the boss replied, "Yes, it is all right," and that it looked all right to the plaintiff, that the plaintiff worked under the wall much of the time that night, shoring the sides of the excavation as it proceeded, and that about seven o'clock in the morning some small stones and mortar became detached from the bottom of the wall and fell upon him, causing the injuries sued for. There was nothing to show that the falling of the stones was due to any changes made that night. There was evidence that the "night boss" was a person exercising superintendence. *Held*, that the jury properly might find that the answer of the superintendent that the wall was all right was intended by him and was understood by the plaintiff to mean that the wall was braced and supported securely so that no part of it would fall into the cellar, that the plaintiff, relying upon that assurance and seeing nothing inconsistent with it, proceeded to work under the wall in the exercise of due care, that there was negligence in not providing a suitable place for the plaintiff to work, and that this was the negligence both of the superintendent and of the defendant.

In a notice to an employer of the time, place and cause of an injury required by R. L. c. 106, § 75, for the maintenance of an action under the employers' liability act, an averment of the negligence of the defendant in a matter stated includes not only personal negligence of the defendant but also negligence of a superintendent in his employ, and under it negligence of either or both of them may be proved.

A declaration in an action for personal injuries against an employer, brought within one year after the accident which caused the injuries, containing a count at common law alleging a failure to provide the plaintiff with a reasonably safe place in which to work and a count under the employers' liability act alleging a defect in the ways, works or machinery of the defendant, properly may be amended by the addition of a count alleging negligence of the defendant's superintendent as the cause of the same accident, and it does not matter that the amendment is offered and allowed more than a year after the accident, the new count being simply a statement of another ground on which the same cause of action is presented.

TORT by a carpenter against his employers for personal injuries incurred on March 23, 1904, by reason of some small stones and mortar from part of an old wall falling upon him while he was working beneath the bottom of this wall in shoring up the earthen sides of a cellar which was being excavated preparatory to the construction of a large office building, called the John Hancock Building, on Federal Street in Boston, with a first

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count at common law alleging a failure of the defendants to supply the plaintiff with a reasonably safe place in which to work and a failure properly and safely to support a wall and to shore up and brace the sides of it, and a second count under the employers' liability act alleging a defect in the ways, works or machinery of the defendants. Writ dated June 14, 1904.

After more than a year had expired from the date of the plaintiff's injuries, but some months before the trial of the case, the plaintiff filed a motion to amend his declaration by adding a third count alleging negligence of the defendant's superintendent under the employers' liability act. The defendants contended that the motion, as matter of law, should be disallowed and that the plaintiff was confined to causes of action alleged in his notice, but the judge allowed the amendment, and the defendants excepted.

At the trial in the Superior Court before *Bell*, J., the defendants objected to the admission of any evidence under the third count thus added by amendment. The judge admitted evidence under this count, and the defendant excepted.

The facts which appeared in evidence, or the finding of which was warranted by the evidence, are stated in the opinion. At the close of the evidence the defendants asked the judge to direct a verdict for them. This the judge refused to do, and submitted the case to the jury. The jury found for the defendants on the second count. On the first and third counts they returned a verdict for the plaintiff in the sum of $1,700; and the defendants alleged exceptions.

W. H. Hitchcock, (*G. A. Drury* with him,) for the defendants.

W. A. Thibodeau, (*G. L. Ellsworth* with him,) for the plaintiff.

HAMMOND, J. The plaintiff was an experienced carpenter, and at the time of the accident was engaged with others in shoring up the earthen sides of the cellar as the excavation proceeded. A part of the old wall which was to be preserved and kept in position so as to form a part of the new wall, was braced by planks placed against its face, and was supported by a wooden girder placed under it, the girder resting at each end upon parts of the new wall and in the middle upon an upright post. This part of the old wall was two or three feet thick and was made of

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mortar and rough granite stones, both great and small. The wooden girder by which it was supported was from twelve to fourteen inches wide, so that nearly, if not quite, one half of the bottom of the wall was not covered by the girder. While the plaintiff was at work under this wall a small portion of it, consisting of small stones and mortar, became detached from the bottom and fell upon him and injured him.

It is urged by the defendant that the plaintiff was hired to shore up places that needed shoring, that if the bottom of the wall was insecurely shored it was his duty to cure the defect, and if he did not do it the accident was the result of his own inattention to duty; moreover, that he must be held to have assumed the obvious risks of the business, that the liability that the uncovered part of the old wall would fall was an obvious risk and must be held to have been known and appreciated by an experienced workman like the plaintiff.

There is evidence, however, that when the plaintiff, who was one of the night gang, went to work that night, he asked Wetherbee, who was the "night boss," if the old wall was "real secure," and that Wetherbee replied, "Yes, it is all right." The plaintiff testified that it looked to him all right. He worked under the wall much of the time that night, shoring the sides of the excavation as it proceeded; and the accident occurred just before seven o'clock in the morning. We think the jury might properly find that the plaintiff relied upon this assurance of Wetherbee, and had a right to rely upon it at least until he saw some indication to the contrary, or until something happened to arouse his suspicions.

It is urged, however, by the defendant that the inquiry and answer plainly referred only to the shoring and securing of the old wall by the braces that were resting against its face. But it is to be noted that both the plaintiff and Wetherbee expected that the plaintiff would have occasion to work under the wall in the course of the night; and the jury may well have found that both supposed the inquiry was made for the purpose of ascertaining whether the plaintiff could safely work there as it was, or was likely to be, during the night. It was as important for the plaintiff to know that the wall was so supported that no part of the bottom would drop upon him as that it was so shored

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upon the face that no part of it would strike him by toppling over into the cellar.

It is unnecessary to discuss this part of the case further. Upon the evidence the jury might properly have found that the answer of Wetherbee that the wall was all right was intended by him and understood by the plaintiff to mean that the wall was securely braced and supported so that no part of it would fall into the cellar; and that there was no occasion therefore for the plaintiff to work upon it in the way of "boxing" it (a course which had been adopted in other parts of the cellar), or in any other way, or to pay any further attention to it; that the plaintiff, in reliance upon that assurance and seeing nothing inconsistent with it, proceeded to work under the wall in the exercise of due care; that the fall of a part of the wall was due in no respect to any changes made that night, after the assurance was given, which were known or might have been known to the plaintiff in the exercise of due care; and that under the circumstances there was negligence in not providing a suitable place for the plaintiff, and that this was the negligence both of Wetherbee and of the defendant. Upon such a finding, taken in connection with the other evidence, including that as to the superintendence or control exercised by Wetherbee, the verdict for the plaintiff upon the first and third counts would be warranted.

The defendant argues that the notice is not broad enough to cover the third count. In the notice the cause of the injury was said to be "the dangerous condition of the ways and works, and of your negligence in not properly shoring up that part of the old foundation wall left standing on the Federal Street side." It is urged that the only negligence spoken of is that of the defendant, and not that of a superintendent. The averment of the negligence of the superintendent was unnecessary. The notice was sufficient. Under it the plaintiff could prove negligence for which the defendant was answerable, whether it be his own personal negligence or that of a superintendent. See *Brick* v. *Bosworth*, 162 Mass. 334.

Finally, it is said by the defendant that this third count added a new cause of action, that an action under the employers' liability act, (R. L. c. 106, § 71,) must be brought within one year from the time of the injury; that the motion to insert this count

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was made after the expiration of the year and hence that the court had no power to allow the amendment. While it is true that the action under the statute must be brought within the year, (*McRae* v. *New York, New Haven, & Hartford Railroad*, *ante*, 418,) the answer to the defendant's contention is that this action was brought within that time; that it was plainly brought under the statute for it contained a count based upon it; that the cause of action was the injury under the circumstances under which it took place; that the notice is broad enough to cover the third count, and that the count does not state a new cause of action under the statute, but is simply another statement of the same cause of action. See as instructive upon the distinction between a cause of action and the ground upon which it is presented, *Basett* v. *Connecticut River Railroad*, 150 Mass. 178, and cases cited. The exception of the defendant to the admission of evidence in support of the third count upon the ground that the count was not properly before the court is overruled. The defendant has not argued any exception to the admission of evidence upon any other ground, and such other exceptions must be regarded as waived.

Exceptions overruled.

CUMBERLAND GLASS MANUFACTURING COMPANY *vs.* FREDERICK E. ATTEAUX.

Suffolk. March 24, 1908. — June 18, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Evidence, Best and secondary. *Witness*, Contradiction.

In an action upon a contract guaranteeing sales made by the plaintiff to a certain corporation, of which at the time the guaranty was executed the defendant owned substantially all the stock, the defendant testified that before the sales to the plaintiff were made he had withdrawn from the corporation, had transferred all his shares to a person who was the treasurer of the corporation, and in an interview with the plaintiff had informed him of his withdrawal and had notified the plaintiff that he no longer would guarantee the debts of the corporation, to which the plaintiff had assented, saying that a formal notice revoking the defendant's guaranty would be unnecessary. All of this was denied by the plaintiff, who testified that he never had received any notice of a revocation of the guaranty or of the defendant's disposing of his interest in the corporation. The plaintiff called as a witness the person to whom the

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defendant testified that he transferred his shares in the corporation, and who was its treasurer. This witness testified that all the books of the corporation had been lost or destroyed and could not be produced. He also testified that he could not remember how many shares of stock the defendant had, nor how many he himself had, nor what other persons held stock, nor whether or not the defendant had transferred his shares. The corporation was organized in another State. The plaintiff offered in evidence a certificate of the secretary of state of that State certifying to a copy of a record of a return, purporting to be made by the witness as treasurer of the corporation. The return purporting to be signed by the witness was dated one year after the time when the defendant had testified that he had transferred all his shares to the witness, and contained a list of the stockholders, in which the defendant was put down as the holder of a large number of shares. The witness was shown the certificate and was asked whether he made the return of which the certificate purported to be a copy. He answered that he did not remember, but that he was required to make such a return once a year, and that if he made that return he thought it was correct. Subject to the exception of the defendant the judge admitted the certificate in evidence for the purpose of showing that the witness "made such a report, and for no other purpose." *Held*, that the plaintiff was entitled to show that one year after the time when the defendant testified that he had transferred his shares they still stood in his own name, that, in view of the loss of the books of the corporation and the inability to produce them and of the want of recollection of the treasurer as to who were the stockholders or whether the defendant had transferred his shares, a copy of the record of a return purporting to be signed by a person bearing his name and occupying the office which it was shown that he occupied was admissible as some evidence to show that the witness was the same person who filed the return, and that this evidence, taken in connection with the testimony of the witness that if he made the return it was correct, had a tendency to show the truth of the statements contained in it; *also*, that this evidence did not contradict the testimony of the witness called by the plaintiff, as it was not inconsistent with his statement that he did not remember; *also*, that the matter on which the statements in the return tended to contradict the defendant was not an immaterial one, as the truth of the defendant's statements as to his ownership of the stock had a material bearing upon the probability of the ground of defense set up by him.

CONTRACT for $942.86, with interest from January 1, 1900, with a count on an account annexed and a special count on a contract of guaranty which is printed below. Writ dated July 6, 1900.

The contract declared upon was as follows:

"Boston, Aug. 8, 1894.

"Cumberland Glass Mfg. Co.
Bridgeton N. J.

"Dear Sirs:

"In the future, please bill all goods ordered of you to the Grocers Specialty Co. instead of F. E. Atteaux & Co. Kindly note that the address is changed to 26 India Square. We notice

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that you shipped these to 37 India Wharf, Boston. Our concern is not and never has been located at that address. We were formerly at 37–8 India Street. All bills will be guaranteed as usual.

"Yours truly,
"F. E. Atteaux & Co.
Grocers Specialty Co.
F. E. Atteaux, Treasurer."

In the Superior Court the case was tried before *Pierce*, J. The plaintiff introduced in evidence an auditor's report, finding in its favor for the amount claimed in the declaration, and rested. The defendant introduced evidence tending to show that at the time he wrote the letter of August 3, 1894, he owned substantially all of the stock of the Grocers Specialty Company, and was actively interested in its business; that in January of 1898 he had arranged with one Ward for the sale of his interest in the Grocers Specialty Company; that in the same month the president of the plaintiff called upon the defendant at his office in Boston and the defendant then informed him that he contemplated disposing of his interest in the business and that after the end of the current month he would not be responsible upon his guaranty for the debts of the Grocers Specialty Company, as Ward had taken over the business, and asked the president of the plaintiff whether a formal letter revoking his guaranty would be necessary, and that the president replied that such a letter would not be necessary.

Ward had been doing business in South Boston under the name of the Eagle Extract Company. The office of the Grocers Specialty Company was at 26 India Square, Boston, and remained there until July, 1898, when the lease of those premises expired. The defendant also introduced evidence tending to show that the plaintiff had sold goods to Ward under the name of the Eagle Extract Company for about twenty years.

A large number of the items of the plaintiff's declaration were originally charged to the Eagle Extract Company, and there was evidence that those charges were transferred to the Grocers Specialty Company. The plaintiff offered evidence tending to show that these items were so charged to the Eagle Extract

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pany erroneously and that the goods were sold and delivered
e Grocers Specialty Company, and that evidence upon that
ect was introduced before the auditor.
pon behalf of the plaintiff, the president of the plaintiff de-
that he ever had the interview with the defendant in Janu-
1898, as the defendant had testified, and denied that the
ndant ever informed him that the defendant contemplated
osing of his interest in the Grocers Specialty Company, and
ed that the defendant notified him in any way that he would
be longer responsible for the debts of the Grocers Specialty
ipany to the plaintiff.
pon cross-examination, the defendant testified that he owned
t of the stock of the Grocers Specialty Company until Janu-
1898, and was treasurer of that company; that some time in
8 the business of the Eagle Extract Company, of which Ward
proprietor, was consolidated with that of the Grocers Spe-
ty Company, in this manner: The value of the assets of each
cern was ascertained, and shares of stock in the Grocers Spe-
ty Company were given to Ward and to the defendant in
portion to the value of the assets contributed by them, re-
ctively; that he did not remember the number of shares
ich he, the defendant, had, but he thought they were about
ty, and that Ward had the balance, with the exception of
share to one Stewart, a nephew of the defendant, and one
re to one Blanchard, to qualify them each to be directors;
l that thereafter the business was carried on by the con-
idated corporation.
The defendant also testified on cross-examination that subse-
ently to the consolidation he turned over all of his shares of
ck to Ward in the latter part of 1898; that thereupon he
idered in writing his resignation of the office of director, and
at thenceforth he had no connection with the corporation, the
ocers Specialty Company.
The plaintiff contended that the defendant did not turn over
shares to Ward and did not resign the office of director. In
pport of this contention the plaintiff endeavored to show the
ord of the holdings of stock in the Grocers Specialty Com-
ny and of the transfers thereof; and in that behalf the plain-
f's counsel had given due notice to the defendant to produce

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in court at the trial the stock book and all other books of that corporation; but the defendant failed to produce the books or any of them and testified that they had never been in his possession, and that he did not know where they were.

The defendant was asked upon cross-examination if he could fix the date of his alleged transfer of the shares to Ward or any consideration that he received from Ward for the sale thereof by referring to his own account books; and he replied that his books had been destroyed. He testified that at the time of the transactions in question he was doing a business of from a million and a half to two million dollars annually.

It appeared that on March 23, 1900, the Grocers Specialty Company had made a voluntary assignment to one McGuire of all its assets for the benefit of its creditors. A summons had been issued to McGuire to produce the books of the Grocers Specialty Company in court, and McGuire testified that he had never had them and did not know where they were. A like summons had been issued to Ward, the treasurer of that corporation, to produce the books of that corporation, but he failed to do so, and testified that after search he could not find them, and that many of the books of the corporation had been destroyed, that he did not know where the stock book was nor whether it had been destroyed. He also testified that he could not remember how many shares of stock the defendant had, nor how many he himself had, nor what other persons held stock, nor whether or not the defendant had transferred his shares.

The plaintiff offered evidence, which was admitted without objection, that on April 27, 1899, the defendant as a director of the Grocers Specialty Company signed and made oath to a certificate of the condition of that corporation, which was filed in the office of the secretary of state of this Commonwealth.

Ward was shown the certificate printed below, and was asked whether he made to the secretary of state of Maine the return of which the certificate purported to be a copy, to which he replied that he did not remember, but that he was required to make such a return once a year and that if he made that return he thought it was correct.

The plaintiff offered in evidence the following certificate:

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"State of Maine.

"Office of Secretary of State.

I hereby certify that the paper to which this is attached is a copy from the records of this office.

I further certify that I am the legal custodian of said record; I am the proper officer to attest the said copy of the same; this attestation is in due form; that I am the keeper of the t seal of the State.

In testimony whereof I have caused the seal of the State to ereunto affixed.

Given under my hand at Augusta, this twenty-first day of , in the year of our Lord one thousand nine hundred and n and in the one hundred and thirty-first year of the independence of the United States of America.

"A. I. Brown,
Secretary of State."

al of State.]

[Attached:]

"State of Maine.

"November 1st, 1899.

o Hon. Byron Boyd,
Secretary of State:

"In compliance with the Statutes of the State of Maine, the asurer of the Grocers Specialty Company makes the following return of the names of all the stockholders of said corporations, their residence, the amount of stock owned by each, and e whole amount paid in on the first day of November, A. D. 99:

mes of Stockholders.	Residence.	Amount of Stock owned by each.
C. Ward,	Boston, Mass.	115 shares.
E. Atteaux,	" "	46 "
hn H. Blanchard,	" "	1 "
arold S. Stuart,	" "	1 "

Whole amount of stock paid in November 1st, 1899, 163 shares. ar value of shares, $100.

(Treasurer sign here) "E. C. Ward,
Treasurer."

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The defendant objected to the admission of the certificate, but the judge admitted it for the purpose of showing that the treasurer, Ward, made such a report, and for no other purpose. The defendant excepted to its admission.

The jury returned a verdict for the plaintiff in the sum of $1,107.15; and the defendant alleged exceptions, raising the single question as to the admission of the certificate in evidence.

The case was submitted on briefs.

I. R. Clark & G. F. Ordway, for the defendant.

C. W. Clark, for the plaintiff.

HAMMOND, J. As bearing upon the probability of the defendant's story that before the delivery of the goods in question he had informed the plaintiff's president that he was about to sell out his interest as shareholder in the Grocers Specialty Company, and his further statement that in pursuance of that intention he did thereafter, in the latter part of 1898, sell his shares of stock to Ward, we think the plaintiff was entitled to show that as late as November 1, 1899, such a conveyance had not been made.

In view of the evidence of Ward, who was the treasurer of the Grocers Specialty Company, that many of the books of the corporation had been destroyed, that after search made by him he could not find the stockbook, did not know where it was or whether it had been destroyed, and his want of recollection as to who were the stockholders or whether the defendant had transferred his shares, the copy of the record purporting to be signed by a person bearing his name and occupying the office which it was shown he occupied was admissible as some evidence to show that the Ward who testified was the same Ward who filed the certificate. *Binney* v. *Russell*, 109 Mass. 55. Only for this limited purpose was it admitted. The proof that the certificate was made by the Ward who testified, when taken in connection with his evidence upon the stand that if he made it he thought it was correct, had a tendency to show the truthfulness of the statements therein contained. See *Atherton* v. *Emerson*, *ante*, 199.

It is argued by the defendant that the evidence was not admissible to contradict Ward, called by the plaintiff, but the answer is that it did not contradict him. He had not testified

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to anything inconsistent with the return. He had simply said that he did not remember. Nor was the certificate inadmissible upon the ground that it tended to contradict the defendant upon an immaterial matter. The truthfulness of the defendant's statements as to his ownership of stock had a material bearing upon the probability of the ground of defense set up by him.

Exceptions overruled.

HARRIET E. FRENCH *vs.* MERCHANTS AND MINERS TRANSPORTATION COMPANY.

Suffolk. March 11, 1908. — June 19, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Carrier. Contract, Construction, Validity. *Negligence. Fire.*

If one, whose eyesight is so defective that, although he can see large objects, he cannot read print, purchases and accepts from a carrier a ticket upon which a long contract of transportation, with many terms and conditions, is stated, he is bound by such of the terms of the contract as are valid, whether he reads the contract or not.

A provision of a contract of transportation, printed upon a ticket which a passenger accepted, contained a provision that the carrier "shall not be liable for delay, loss, default, injury or damage to passenger, money or effects, arising from fire, robbers, thieves, perils of the sea, rivers, or navigation, deviation, collisions, or accidents to or of machinery, boilers or steam, or from any causes beyond its control. Negligence shall not be presumed." *Held*, that the provision was not invalid as an attempt to exempt the carrier from the consequences of negligence on his part, since it should be construed as exempting the carrier in case he was not negligent.

A transportation company, which by the terms of its contract with a passenger is to transport the passenger's baggage with him, but is exempt from liability for injury to or loss of the baggage which is not caused by its negligence, is not liable for the loss of the baggage while in its possession through a fire which was not caused by its negligence, although, if the carrier had not negligently delayed the transportation of the baggage, it would not have been burned.

CONTRACT for failure to transport the plaintiff's baggage safely and deliver it to her at the end of her journey. Writ in the Superior Court for the county of Suffolk dated November 12, 1906.

At the trial, which was before *Wait*, J., it appeared that the

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plaintiff had purchased a ticket for transportation by rail from Jacksonville, Florida, to Savannah, Georgia, and over the defendant's steamship lines from Savannah to Boston, via Baltimore, Maryland, and that the ticket contained the following printed provision: "The company shall not be liable for delay, loss, default, injury, or damage to passenger or baggage, money or effects, arising from fire, robbers, thieves, perils of the sea, rivers, or navigation, deviation, collisions or accidents to or of machinery, boilers or steam, or from any causes beyond its control. Negligence shall not be presumed."

The plaintiff's evidence tended to show that, upon her arrival at Baltimore on June 4, she asked the steward of the boat upon which she was if she could have her trunk rechecked to Boston, and, upon examining her ticket and her trunk check, he said, "You keep this check and I will put a tag on your trunk for Boston." The plaintiff kept the check, and the trunk stayed in Baltimore, where it was burned upon a wharf of the defendant on June 13, the plaintiff in the meantime having sailed for Boston on June 5 and arrived there on June 8.

Other facts are stated in the opinion.

At the close of the evidence, the presiding judge directed a verdict for the defendant, and the plaintiff excepted.

T. R. Bateman, (*H. W. Brown* with him,) for the plaintiff.

G. F. Manson, for the defendant.

LORING, J. It is stated in the bill of exceptions that the plaintiff did not "contend that this fire was due to any negligence whatsoever on the part of the defendant, nor that the defendant was lacking in diligence in trying to control and extinguish said fire." This ended the plaintiff's case unless it was taken out of the usual rule by the fact that the jury were warranted in finding from the testimony of the plaintiff that she "could see large objects, but could not read print and had not been able to read for over a year previous to this trip."

We do not think that the plaintiff's case would have been taken out of the usual rule if the jury had believed the plaintiff and found that her eyesight was what she testified it to be.

The usual rule is that a passenger who accepts a ticket on which the contract of transportation is stated is bound by its terms whether he reads it or not. *Grace* v. *Adams*, 100 Mass.

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Quimby v. *Boston & Maine Railroad*, 150 Mass. 365. *Fonseca* v. *Cunard Steamship Co.* 153 Mass. 553. *Cox* v. *Central Vermont Railroad*, 170 Mass. 129. *Graves* v. *Adams Express Co.* 176 Mass. 280. *John Hood Co.* v. *American Pneumatic Service Co.* 191 Mass. 27.

The ticket here in question must be taken on this bill of exceptions to contain on its face nearly two quarto pages of printed provisions.* It must have been apparent, even to a person who can see only "large objects," that the ticket contained a contract, and the plaintiff was bound to have it read to her if she could not read it herself.

By the terms of the contract between the plaintiff and the defendant, the defendant is not to be liable for injury to baggage arising from fire. The legal result of such a contract is that it is not liable for fire unless negligent. *Grace* v. *Adams*, 100 Mass. 505. *School District* v. *Boston, Hartford & Erie Railroad*, 102 Mass. 552. *Pemberton Co.* v. *New York Central Railroad*, 104 Mass. 144, 151. *Hoadley* v. *Northern Transportation Co.* 115 Mass. 304, 305. What was said by this court in *Fonseca* v. *Cunard Steamship Co.* 153 Mass. 553, 557, and in *Cox* v. *Central Vermont Railroad*, 170 Mass. 129, 137, means that such a contract is invalid, if it is construed to be a contract exempting the carrier when he is negligent. It was not meant that where the contract exempts the carrier generally without referring in terms to the subject of negligence, it is invalid altogether. Such a contract is construed to be a contract exempting the carrier unless the passenger proves that he was negligent.

The plaintiff therefore is thrown back on her contention that the jury were warranted in finding that the defendant agreed to carry her trunk from Savannah to Boston and was negligent in holding her trunk in Baltimore from June 4 until June 13, when

* The copy of the ticket printed in the bill of exceptions contained a statement that it was issued "subject to the following contract between the purchaser and all lines over which it reads," followed by eleven provisions stated in five hundred and forty-two words. There was no explicit statement in the bill of exceptions as to the size of the ticket, or whether the printed matter was on its face or its back, but there was a statement, "The ticket was stamped on its back as follows," (giving the name of the steamer, the company, and the date) which would seem to indicate that the above provisions were on the face of the ticket.

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it was destroyed by fire. For the natural and probable consequences of that delay the defendant would be liable if such a finding was warranted on the evidence. But the destruction of the trunk by fire was not the natural and probable consequence of not forwarding it promptly, and, since the only liability of the defendant is for delay, it is not liable for its loss. *Denny* v. *New York Central Railroad*, 13 Gray, 481. *Hoadley* v. *Northern Transportation Co.* 115 Mass. 304. See also in this connection *Whitcomb* v. *Bacon*, 170 Mass. 479, 482; *Hurley* v. *Packard*, 182 Mass. 216.

Exceptions overruled.

LEWIS L. WHITMAN *vs.* WILLIAM G. McINTYRE & others.

Hampden. March 28, 1908. — June 19, 1908.

Present: MORTON, HAMMOND, LORING, & SHELDON, JJ.

Assignment, For the benefit of creditors. *Trust.*

The plaintiff in a suit in equity, brought by one, who had assigned a distillery plant to assignees for the benefit of his creditors, against the assignees for an accounting, contended that the assignees had not conducted the business in a prudent and businesslike manner, had wrongfully employed one C. to manage it, and had wrongfully sold it to a corporation for less than it was worth, receiving in payment shares of the capital stock of the purchasing corporation instead of cash. One of the terms of the assignment was that the assignees should carry on the business if they could do so at a profit, and at the end of a year could sell it and convert it into money if at that time they found the condition of the estate to be such that the assignor's debts could not be paid without a sale. A master to whom the case was referred found that there was no actual fraud on the part of the defendants in any respect and that they had not attempted to profit in any improper way at the expense of the estate; that the appointment of C. was agreed to by the plaintiff, and that, in making it, the defendants had acted wisely and for the best interests of the estate, and that C. had acted honestly; that at no time after the assignment was made had the assets been enough to pay the claims of the creditors who had become parties to the assignment, that at the end of a year a fair value of the estate did not exceed $20,000, that thereupon the defendants sold the entire business to a distilling company, taking in payment two hundred shares of the capital stock of the company which was worth from $75 to $100 per share, that the creditors who had become parties to the assignment had consented to the sale, and had agreed to take proportional parts of the shares of stock reserved from the sale in payment of their claims. *Held*, that the bill must be dismissed, since it did not appear that any of the acts of the defendants were wrongful or that their con-

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duct of the business was unbusinesslike; and since, as to the receipt of shares of stock instead of cash for the sale of the business, the facts, that the proceeds of the sale were insufficient to pay the creditors, that therefore no balance could have been paid to the plaintiff, and that the creditors were content with the stock in lieu of cash, made the sale in effect one for cash so far as the creditors, who were the only parties in fact interested in its proceeds, were concerned.

The owner of a distilling business assigned it for the benefit of his creditors to three persons, two of whom were presidents of two banks who were creditors, and the third the cashier of a third creditor bank. Among the terms of the assignment were provisions that the assignees should carry on the business if they could show a profit, and that, if after a certain time no profit was shown, they might sell it. The assignees, acting with prudence, gave one C. a power of attorney to conduct the business for them, and, the business not showing a profit in the specified time, sold it for a fair price to another distilling company, the purchase price being paid in shares of the capital stock of the purchasing company. At the time the sale was made, C. was a stockholder in the purchasing company and, to carry out the sale, an increase of $5,000 in its capital stock was voted by the purchasing company and its by-laws were changed by making its board of directors nine instead of seven. C. and one of the assignees, before the execution of the deed of sale, subscribed for $5,000 of the new stock and were elected directors of the purchasing company. The assignor brought a bill in equity against the assignees and the purchaser to set aside the sale, and a master to whom the suit was referred found that the assignees had acted honestly and had gained no advantage from the transaction, and that the assets in their hands never were sufficient to pay the claims of the creditors who had assented to the assignment. It did not appear that the purchase of stock by, and the election as directors of the purchasing company of, C. and one of the assignees was a part of the contract of sale to that company, but it did appear that all of the creditors who had assented to the assignment acquiesced in the sale as made and in the purchase of stock by, and the selection as directors of, C. and the assignee. *Held*, that, although the general rule is well settled that a trustee cannot directly or indirectly himself be a purchaser of the trust property or derive any personal advantage or profit from its management, the facts did not bring this case within such rule, and the bill must be dismissed.

BILL IN EQUITY, filed in the Supreme Judicial Court for the county of Hampden September 28, 1899, by one, who made an assignment for the benefit of his creditors, against William G. McIntyre, William F. Callender, E. Dudley Chapin, the assignees, and others as stated in the opinion, for an accounting.

The case was referred to a master, who filed a report and a supplemental report, to which exceptions were filed by the plaintiff's executor, who, on the death of the plaintiff, had been admitted to prosecute the suit. There was a hearing on the exceptions before *Hammond*, J., who reserved the case for consideration by the full court.

The facts are stated in the opinion.

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H. F. Buswell, (*M. H. Browne & J. M. Browne* with him,) for the plaintiff.

C. C. Spellman, for the defendants.

MORTON, J. This case was reserved for the full court by a single justice on the pleadings, the master's report and supplemental report and the exceptions thereto — such decree to be entered "as equity may require."

The bill is a bill to compel an accounting by the defendants McIntyre, Callender, and Chapin as trustees under a deed and assignment made to them by the plaintiff for the benefit of his creditors, and by one Coats, who is alleged to have been wrongfully employed by them to carry on the business of the trust. It also seeks to set aside a conveyance made by the trustees to the Gowdy Distilling Company, the other defendant, and to have the property reconveyed to the plaintiff. The plaintiff has deceased since the suit was begun and it is prosecuted by his executor.

The principal part of the property conveyed to the trustees consisted of a distillery in Agawam carried on by the plaintiff under the name of the H. Porter Company, and of the personal property belonging to and connected therewith. The assignment * provided, amongst other things, that the trustees could carry on the distillery if they could do so at a profit, and, if at the end of a year they found that the condition of the estate was such that the debts could not be paid without a sale of the property, then they could sell it and convert it into money. The trustees came to the conclusion at the end of the year, and rightly, as the master has found, that the condition of the estate required that the property should be sold, and after some negotiation they sold the distillery to the Gowdy Distilling Company, receiving in payment therefor two hundred shares of the capital stock of that company of the par value of $100 each. The plaintiff alleges in substance that the trustees did not conduct the business in a prudent and businesslike manner or in accordance with the terms of the trust; that they wrongfully agreed with Coats to carry on the business of the distillery; that the debts could have been paid or reasonably provided for without a sale of the distillery; that the sale to the Distilling Company

* The assignment was dated December 1, 1897.

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s fraudulent and collusive and was voidable by reason of the ct that Chapin and Coats were directors and stockholders in at company; that the sale was not for money as according to e terms of the assignment it should have been; and that what as received for the sale and conveyance was much less than ie value of the property conveyed. The plaintiff also contends iat the trustees were negligent in not making some arrangeient for payment by the banks where they were deposited of nterest on the trust funds, and in not providing for the sale nd application of certain collateral from which the dividends eceived were less than the rate of interest on the notes and lemands secured by the collateral.

It will be seen that the most of these contentions and objections relate to matters of fact. In regard to such matters the master's findings will not be disturbed unless clearly erroneous.

The master finds generally "that in connection with the appointment of the attorneys,* the conduct of the business, the sale of the distillery and other property, and the management of the trust generally, there was no actual fraud, bad faith or collusion on the part of the defendants, or any attempt to profit in any improper way individually or collectively at the expense of the estate, or against the rights of the plaintiff." He finds more particularly in regard to the appointment by the trustees of the firm of E. M. Coats and Company as their agents and attorneys for the purpose of carrying on the distillery, and managing the business, that the appointment was agreed to by Whitman, and that in making the appointment "the trustees acted wisely, in good faith and for the best interests of the estate, and in the performance of the duties assigned to them, the said firm and the defendant Coats have dealt honestly with all parties concerned and without any improper advantage to themselves." We see nothing to impugn the correctness of these findings.

It cannot be said, we think, that the trustees managed the trust in an imprudent and unbusinesslike manner and the mas-

* The "attorneys" here referred to were the firm of E. M. Coats and Company, wholesale and retail liquor dealers in Springfield, of which the defendant Coats was a member. The trustees executed a power of attorney, authorizing them to carry on the business for the trustees. The power by its terms was revocable at any time without notice.

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ter has not so found. The parties, and especially the plaintiff, may have been disappointed, as not infrequently happens in such cases, in their expectations as to the amount of the estate and what would be realized from it. But that furnishes no ground, of course, for holding the trustees liable. At the time the distillery was taken over by the trustees, it was being operated at a loss, and was very much run down and out of repair. It was thought that, by making necessary repairs, it could be brought up to a state of efficiency and a profit made, and the trustees expended a considerable sum upon repairs. The master has found that the expenditure was necessary and proper. The trustees were disappointed in making a profit; but there is nothing to show that they did not exercise a sound business judgment in what they did, or that in selling the product or disposing of any of the other property the estate suffered any loss in consequence of what they did or omitted to do. We do not think, therefore, as already observed, that it can be said that the trustees did not carry on the business in a prudent and businesslike manner.

As to the sale to the Gowdy Distilling Company, the master finds that the stock of that company was worth at the time of the sale from $75 to $100 per share, and that the property conveyed did not exceed in value $20,000, including the good will and the trademark, which he finds was once valuable, but, owing to changes in the conditions of business, had lost most of its value. He also finds that at no time would the assets have been sufficient to meet the outstanding claims of the creditors who had become parties of the third part to the assignment, and who, with the plaintiff, were the only parties interested in the sale, so as to leave any balance payable to the plaintiff. And he finds still further that the creditors aforesaid consented to the sale and agreed to take their proportional part of the stock on account of and in payment of their respective claims. As to them, therefore, the sale was in effect a sale for money and the plaintiff has no just ground for complaint that the sale was for stock in the Gowdy Distilling Company and not for money, even if we assume that the sale could not otherwise be fairly regarded as a sale for money.

We see no ground on which the sale can be avoided by the

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plaintiff because of the relation of Coats and Chapin to the transaction. The general rule is well settled that a trustee cannot directly or indirectly himself be a purchaser of the trust property or derive any personal advantage or profit from the management of the estate. But in the present case Coats occupied no fiduciary relation whatever to the plaintiff, and, so far as he acted as agent and attorney for the trustees, the master has found, as already observed, that he dealt honestly with all parties concerned. Chapin was trustee under the assignment, and if he had purchased the property for himself directly or indirectly or for the bank of which he was cashier,* the plaintiff could have the sale set aside, or if he had derived any personal profit or advantage from the management of the estate he could be compelled to account for it. But the sale was not to Chapin nor to the bank, but was to the Distilling Company. The terms of sale were agreed upon between the trustees and the directors of the Distilling Company with the consent and approval of all other parties interested except the plaintiff. Chapin was not a director of or a stockholder in the Distilling Company at the time when the terms of the sale were agreed upon. He was elected a director before the deed was executed, presumably to represent the interests of his bank which was a creditor and of other creditors and he became a stockholder. Coats, who was a stockholder in the Distilling Company and a large creditor of the plaintiff, was also elected a director at the same time. The master does not find that it was understood and agreed as a part of the terms of the sale that Chapin should become a stockholder in and should be elected a director of the Distilling Company, and we are not called upon, therefore, to consider what the effect, if any, of such a finding would be. The sale could not be carried through unless the capital stock of the Distilling Company was increased, and at some time, it does not appear when, except that it was before the execution of the deed, Chapin and Coats undertook to provide for $5,000 of this increase † and

* Chapin was cashier of the John Hancock National Bank, Callender was president of the Chapin National Bank and McIntyre was president of the Hampden Trust Company. All three of the banks were creditors of the plaintiff before the assignment was made.

† The total increase was $25,000.

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Chapin agreed to take personally some of the stock. Coats took $2,500 of the $5,000 and Chapin the balance, which he obtained from his bank. Subsequently, on a final settlement of the matter between him and the bank, the bank took twenty shares of the stock and Chapin took the remaining five for which he paid the bank. There is nothing, we think, in these transactions or in the other circumstances attending the sale, which gives the plaintiff the right to have the sale avoided. The trustees sold the property as they had the right and it was their duty to do. The sale was approved by all parties interested except the plaintiff. He was not consulted, possibly because his condition was such that it would have been useless to consult him.* There is no reason to believe, if that is material, that the failure to consult him operated to his detriment. The trustees did not advertise the property, but there is nothing to show that it could have been sold on any more favorable terms, or that all parties concerned acted otherwise than in entire good faith. The master finds that at the date of the assignment Whitman was insolvent, and that at no time since have the assets been sufficient for the payment of his debts. The estate belonged, therefore, to his creditors. The trust was a creditor's trust. Presumably Chapin was selected as one of the trustees because his bank was a creditor. In a sense, therefore, the interests which he represented were adverse to those of the assignor. *Prevost* v. *Gratz*, Pet. C. C. 364, 373. And if the creditors, knowing all of the facts, as the master in effect finds that they did, were content that, in addition to being trustee under the assignment, Chapin should also act after the sale had been agreed upon as a director of the purchasing company, and should become a stockholder therein, we cannot see that his doing so or the fact that he became the owner of shares in the Distilling Company after he was elected a director affords any ground for avoiding the sale.

In regard to the matter of interest, the master reports that in his opinion "the trustees should have made provision for the

* The defendant Callender, when asked whether he did not think it was his duty as a trustee to lay the matter before Whitman, replied, "If you want to have me answer that question frankly, I will. I shall have to say that, as I read Mr. Whitman and knew him, I don't think it would make any practical difference in my opinion whether I consulted him or not."

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payment of interest on these deposits, and possibly by the application of funds on hand they might have reduced the loans to some extent, but not having sufficient data before me, I am unable to determine what the amount of such interest should be, or to what extent the loans might have been reduced. But I am satisfied that the result in either event would not materially have increased the assets, or that it would have caused the assets to exceed the liabilities." The burden was on the plaintiff to satisfy the master not only that he was entitled to interest, but, if entitled to it, how much he was entitled to. Having failed to sustain the burden, his exceptions in regard to the matters of interest must be overruled.

On the whole case we think that the entry should be: exceptions to the master's report overruled, master's report confirmed, and bill dismissed with costs.

So ordered.

ROBERT CASSON & others *vs.* W. D. McINTOSH & others.

Suffolk. March 12, 1908. — July 7, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Equity Jurisdiction, Contempt in violation of injunction. *Labor Union. Unlawful Interference.*

At the hearing on a petition for an attachment for contempt in the violation of a temporary injunction issued in a suit brought by a firm of contractors against the members of various labor organizations to restrain them from interfering with the plaintiff's business by intimidating or interfering with any person in his employment, it appeared that the respondents were respectively the president and business agent of a district council made up of delegates of several local unions, and that they were named in, and had had served upon them the injunction alleged to have been violated; that one P., the "business agent" of one of the local unions whose delegates composed the district council, interviewed one of the petitioner's workmen and told him to leave the work because the petitioner was an "unfair" firm, that thereafter the workman received a notice signed by one W., the secretary of the district council, stating that charges had been made against him for violating an article of the council's constitution in working for an "unfair" firm after having been told by a business agent to leave the work, which article subjected the workman to a fine for so doing. The notice further directed the workman to attend a meeting of the council. At that meeting, one respondent presided and the other acted as temporary secretary. Neither P. nor

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W. was present. The judge who heard the case found from the foregoing facts that the respondents were responsible for the notice sent to the petitioner's workman, adjudged them in contempt for that offense and imposed fines. *Held*, that the fines should be returned to the respondents, since there was no evidence that would warrant a finding that they took any part directly or indirectly in the issuing of the notice.

PETITION, filed in the Superior Court for the county of Suffolk October 8, 1906, for an attachment for alleged contempt in the violation of a temporary injunction issued by that court against the defendants in a bill in equity entitled *Robert Casson et al.* v. *Amalgamated Woodworkers of America et al.* The petitioners were contractors.

The petition was heard before *Fox*, J., who, as stated in the opinion, adjudged the respondents McIntosh and Cameron in contempt and ordered them to pay fines, and they appealed.

The facts are stated in the opinion.

G. F. Williams, (*J. C. Madden* with him,) for the respondents.

R. Clapp, (*J. J. Feely* with him,) for the petitioners.

LORING, J. This case comes up on a report. It is a petition for attachment for contempt for violation of a temporary injunction issued by the Superior Court in June, 1906. The injunction restrained McIntosh and Cameron, as well as others, from (among other things) "interfering with the complainants' business by obstructing, annoying, intimidating or interfering with any person or persons who now are or may hereafter be in their employment." The ground of the petition was intimidation of two of the petitioners' employees, Godfray and Andrews by name. The only witnesses called by the petitioners were the two employees and one Watson, the secretary of the Carpenters' District Council, a body made up of delegates from the several unions over which it had jurisdiction.

The two employees testified in substance that they were members and one Potts was the business agent of Local Union 33 of the United Brotherhood of Carpenters and Joiners of America, that during the week of August 20, 1906, Potts called upon them while at work for the petitioners and told them that the petitioners had been declared to be an "unfair" firm. Godfray testified that Potts told him that he would have "to quit this noon," while Andrews testified that Potts told him that "it was up to me whether I should quit or not." Afterwards each em-

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ployee received a notice dated September 11, 1906, signed by Watson (the other witness called by the petitioners), who (as we have said) was secretary of the Carpenters' District Council, notifying him that "charges have been preferred against you for violation of Article 4, C. D. C. on refusing to stop when ordered." They were further notified to attend a meeting of the council on September 20, "for trial of the charge."

Article 4 referred to in the notice is in these words: "That all firms or jobs placed unfair, it shall be the duty of the business agents to remove all men in their employ; any member failing to comply with the demand of the business agent, he shall prefer charges against said member at the next meeting of the executive Board; upon conviction thereof, he shall be fined not less than $10."

There was also evidence that McIntosh presided over the meeting held on September 20, and that at that meeting charges against both employees were read by Cameron,* who acted as temporary secretary, and that the two employees were called upon to defend themselves.

It is not necessary to state in detail what took place then and afterwards, for the judge "found the testimony sufficient to establish the responsibility of McIntosh and Cameron for the notice of September 11." The whole finding is in these words: "From the foregoing facts, I found the testimony sufficient to establish the responsibility of McIntosh and Cameron for the notice of September 11, and that notice, taken in connection with the rules of the association and the doings of Potts, amounts to a demand upon the men to whom it was sent to quit work under the threat of a fine. I, therefore, found that McIntosh and Cameron violated the injunction and ordered them to pay a fine of $20 each." The general finding that McIntosh and Cameron violated the injunction is a conclusion based upon the special finding stated above. The sole question before us is whether the evidence was sufficient to warrant the special finding, and it is therefore of no consequence that the evidence warranted a

* It appeared that McIntosh was president and Cameron was "business agent" of the Carpenters' District Council, and that Potts was "simply a delegate to the council from" the local union of which Godfray was a member.

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finding (if it did warrant such a finding) that what took place on September 20 was a violation of the injunction by these defendants although they were not responsible for the notice of September 11.

As to the special finding, the notice of September 11 was signed by Watson, not by the respondents. There was no evidence that Watson in signing it acted under the direction of the respondents or either of them. Nor was there any evidence that the respondents took any part in the issue of the notice directly or indirectly. The fact that McIntosh and Cameron acted on the notice at the meeting on September 20 is not evidence that they were responsible for the notice.

It follows that the special finding of the judge was not warranted by the evidence, and that the fines paid into court by McIntosh and Cameron must be returned to them.

The Amalagamated Woodworkers of America, Local No. 24, and the other unincorporated unions were improperly joined as defendants, and the title of the suit has been changed accordingly.

So ordered.

MURTAGH McGANN *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 26, 1908. — September 8, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Negligence. Street Railway.

It is no evidence of negligence on the part of a street railway company toward a passenger who was being transported in one of its cars, that, when the car was between two hundred and fifty and three hundred feet from the stopping place where the passenger had signalled to have it stop and had begun to "slow down," it started ahead quickly "with a sudden jerk or jump," and that the passenger, who had gone to the platform to get off when the car reached the stopping place, was thrown off and injured.

The possibility of an electric car giving a jerk is an incident of travel which every traveller must expect. To make out a case of negligence on the part of the corporation operating the car it is necessary to show that the jerk was due to a defect in the track or to negligence in the operation of the car.

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TORT against a street railway company for personal injuries incurred on October 24, 1903, while being transported as a passenger on a car of the defendant, by reason of alleged negligence in the operation of the car. Writ dated December 18, 1903.

In the Superior Court the case was tried before *Pierce*, J., who refused to order a verdict for the defendant or to rule that there was no evidence of negligence on the part of the motorman or on the part of the conductor. He submitted the case to the jury, who returned a verdict for the plaintiff in the sum of $2,000. The defendant alleged exceptions.

R. G. Dodge, (*S. H. E. Freund* with him,) for the defendant.

J. H. Vahey, (*P. Mansfield* with him,) for the plaintiff.

LORING, J. This action is brought by a passenger to recover for injuries suffered by him when he was thrown or fell from a car of the defendant at about eight o'clock in the evening of October 24, 1903.

The car in question was a closed car operated by electricity. The plaintiff got on at Watertown Square, intending to get off at Cottage Street in East Watertown.

The car in question was running east on Mount Auburn Street. The white post for the stopping place next before Cottage Street is at School Lane. Cottage Street is six hundred and thirty feet further on than School Lane. The plaintiff was thrown off at a point two hundred and forty-five feet west of Cottage Street, that is to say, as the car in question was going it had to go two hundred and forty-five feet beyond the place where the plaintiff was thrown off in order to arrive at Cottage Street.

The plaintiff's story was that at or about School Lane he signalled the conductor to stop at Cottage Street. The conductor "bowed his head, and then the car after it went a good ways, slowed up, and I thought it was at Cottage Street, and I got up, and as soon as I got out on the platform it made a sudden jump and threw me right on my head and I didn't know anything more." In another part of his testimony the plaintiff's description of what happened was that "the car gave a jerk." It is admitted that the car did not come to a stop; the plaintiff's testimony as to that was: "It was almost at a full stop." The defendant's tracks from School Lane to Cottage Street are straight and the street was well lighted.

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In addition to his own testimony the plaintiff introduced that of one Neal, who was walking on the right hand sidewalk of Mount Auburn Street, in the direction in which the car was going and just ahead of it. He also put on the stand one Burke, a policeman, who was standing opposite Cottage Street, on the other side of Mount Auburn Street.

Neal testified that the car was "coming apparently slowly, and I looked around. It started forward, and a body came out on to the street." On being asked to state what kind of movement the start was, he testified: "Well, it was a start, going from slowing down to a speed — to a — to quite a speed."

Burke testified: "I saw the car slow down, I saw it start ahead quickly." "It started with a sudden jerk or jump. It started as though — when I have ridden on cars — the motorman would let off the brake and it would start and go ahead."

The plaintiff, in going on to the platform to get off when the car reached Cottage Street, took the risk of all accidents not arising from negligence on the part of the defendant. *Stewart* v. *Boston & Providence Railroad*, 146 Mass. 605, 606. *Weinschenk* v. *New York, New Haven, & Hartford Railroad*, 190 Mass. 250, 251.

We are of opinion that the evidence of the plaintiff did not warrant a finding that the defendant was negligent. A plaintiff does not make out a case by proving that an electric car gave a jerk or similar motion and that he was hurt. *Byron* v. *Lynn & Boston Railroad*, 177 Mass. 303. *Timms* v. *Old Colony Street Railway*, 183 Mass. 193. *Jameson* v. *Boston Elevated Railway*, 193 Mass. 560. *Sanderson* v. *Boston Elevated Railway*, 194 Mass. 337. See also in this connection *Stewart* v. *Boston & Providence Railroad*, 146 Mass. 605; *Snowden* v. *Boston & Maine Railroad*, 151 Mass. 220, 222; *Holland* v. *West End Street Railway*, 155 Mass. 387, 388; *McCauley* v. *Springfield Street Railway*, 169 Mass. 301, 302; *Foley* v. *Boston & Maine Railroad*, 193 Mass. 332, 334, 335.

The possibility of an electric car giving a jerk is an incident of travel which every passenger must expect. To make out a case of negligence on the part of a defendant railway company in such a case the plaintiff must go further and introduce evidence that the jerk in question was due to a defect in the track

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or to negligence in the operation of the car. See *Byron* v. *Lynn & Boston Railroad*, 177 Mass. 303, 305; *Timms* v. *Old Colony Street Railway*, 183 Mass. 193, 194. See also in this connection *Weinschenk* v. *New York, New Haven, & Hartford Railroad*, 190 Mass. 250, 252; *Foley* v. *Boston & Maine Railroad*, 193 Mass. 332, 335.

The description of the jerk given by the witnesses in the case at bar, so far as the character of it is concerned, is well within the previous cases in which it was held that the plaintiff had not made out a case. *Byron* v. *Lynn & Boston Railroad*, 177 Mass. 303. *McCauley* v. *Springfield Street Railway*, 169 Mass. 301. *Timms* v. *Old Colony Street Railway*, 183 Mass. 193. *Jameson* v. *Boston Elevated Railway*, 193 Mass. 560. For similar cases of steam railroads, see *Stewart* v. *Boston & Providence Railroad*, 146 Mass. 605; *Snowden* v. *Boston & Maine Railroad*, 151 Mass. 220; *Weinschenk* v. *New York, New Haven, & Hartford Railroad*, 190 Mass. 250; *Foley* v. *Boston & Maine Railroad*, 193 Mass. 332.

To take the case out of those decisions the plaintiff's counsel rely on the fact that it appeared affirmatively in the case at bar that there was no occasion to slow up and start ahead. If the defendant had rested on the plaintiff's evidence the case would have stood in this respect on all fours with the previous decisions of this court. In those cases, as was said by Lathrop, J., of the case then before the court: "As to the apparent sudden stopping, there is nothing to show that it was not caused by some obstacle suddenly appearing in front, such as a horse and wagon or a person on foot, attempting to cross the track a short distance ahead." *Timms* v. *Old Colony Street Railway*, 183 Mass. 193, 194.

It is not necessary to consider whether it was open to the defendant to argue that this may have been the fact in the case at bar although the case made out by it in evidence was that the speed of the car never changed. For we are of opinion that, even if that was not open to the defendant here, it is not incumbent on the motorman of an electric car to maintain a uniform rate of speed, even if the car is somewhere between two hundred and fifty and three hundred feet of a stopping place at which he had been signalled to stop.

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We have been referred by the plaintiff to a number of cases outside Massachusetts. The case of *Consolidated Traction Co.* v. *Thalheimer*, 80 Vroom, 474, is not in accord with the decisions in this Commonwealth. As we have said in this Commonwealth a plaintiff does not make out a *prima facie* case by introducing evidence that there was a jerk and that he was injured. It seems to be held in *Consolidated Traction Co.* v. *Thalheimer*, that from those two facts the jury can infer that the jerk was so harsh that it hurt the plaintiff and that in such a case the doctrine of *res ipsa loquitur* applies. The doctrine of our decisions is that the burden is on the plaintiff to introduce evidence to prove that the jerk in question was such a jerk that it would injure a passenger who is in the exercise of due care. The only question before the court in the subsequent case of *Scott* v. *Bergen County Traction Co.* 34 Vroom, 407; *S. C.* 35 Vroom, 362, was the contributory negligence of the plaintiff.

We find nothing in the other decisions of courts of final resort cited by the plaintiff in conflict with our cases.

Exceptions sustained.

MARY POLSEY & another *vs.* JOHN F. NEWTON, JR., executor & trustee, & others.

Suffolk. December 3, 1907. — September 4, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & RUGG, JJ.

Probate Court. Equity Jurisdiction, To "remould" will. *Will. Devise and Legacy.*

There is no jurisdiction in equity to "remould," reform or correct an instrument already admitted to probate as a will.

A bill in equity in the Probate Court alleged that by the terms of a will certain personal property was placed in trust for the benefit of the testator's son N. and his wife, for life and, "upon the death of the survivor of them, my said son N. and his wife, to . . . transfer [said property] in equal shares to their three children," that the will had been proved, that, at the time the will was made, neither N. nor his wife had had children, but the testator had three grandchildren (two of whom were plaintiffs, the third having deceased), children of a daughter and of a son, and had intended to mention them in his will instead of three children of N. and his wife, and had given the scrivener who wrote the will such directions, but that the scrivener made an error, that at

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the time of the filing of the bill in equity N. and his wife both were living, fifty years old and childless. The defendants were the trustee, N. and his wife, and another son of the testator and such son's wife. The prayer of the bill was that the will be "remoulded and corrected in that the words 'their three children' be construed as and for the words 'my three grandchildren,' . . . and that the language . . . be made to conform to the facts." The defendants demurred. This court were unanimously of the opinion that the demurrer should be sustained on the ground that there is no jurisdiction in equity to "remould," reform or correct a will after it has been admitted to probate. A majority of the court were of the opinion that the demurrer also should be sustained on the additional ground that, upon the will being construed in the light of the facts alleged in the bill, it expressed without reformation the intention of the testator in accordance with the plaintiff's contention, LORING & BRALEY, JJ., dissenting.

BILL IN EQUITY, filed in the Probate Court for the county of Suffolk, December 8, 1906, by two children of a daughter of Mary E. Wilbur, deceased, testate, against the executor of and trustee under the will of the testatrix, and Nathan S. and Ivory B. Wilbur, sons of the testatrix, and their wives. The principal allegations in the bill are stated in the opinion. Others were that the testatrix made her will in 1900, when she was seventy years old, that she died in 1903, and that the will was probated in 1905.

The prayer of the bill was in the following words: "Wherefore your petitioners pray that said article ten be remoulded and corrected in that the words 'their three children' be construed as and for the words 'my three grandchildren,' in order to carry out the purpose and intent of the testatrix, and that the language in said article be made to conform to the facts existing at the making of the will as hereinbefore set forth; and for such further relief as may appear necessary."

The defendants demurred upon the following, among other grounds:

1. That the bill did not set forth or present any cause or matter within the equity jurisdiction of this court.

2. That the plaintiffs had not in and by their said bill stated such a case as entitled them to the relief prayed for, or any relief against these respondents or any of them.

3. That the bill did not set forth or specify any uncertainty, ambiguity or manifest error appearing upon the face of said will.

4. That the bill in effect asked the court to amend the will of said deceased, after it had been duly admitted to probate,

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and so as to effect a different disposition of said one hundred shares of the stock of the Boston Wharf Company, than was provided by will and the laws of this Commonwealth.

5. That the bill was not, in substance and effect, a petition for construction of said will, or of any provisions thereof, but a petition to this court to amend said will, and to insert testamentary provisions therein which are distinctly averred in said petition to have been omitted therefrom.

6. That the plaintiffs were not the proper parties to present any bill for construction of said will, but that, if any provision of said will were ambiguous, or any doubt existed as to the meaning thereof, the executor would be the proper party, and the only party, to apply to this court for its instructions.

7. That this court has no power to remould the will of said deceased, as prayed for in said petition, if by "remould" is meant or intended any change or alteration in the terms or language of said will, or in any testamentary intention therein expressed.

8. That no occasion had arisen requiring any judicial interpretation or construction of said will, or any action thereon by the court.

There was a hearing before *Grant*, J., who sustained the demurrer. On appeal to this court, the case was heard by *Braley*, J., who reserved it for consideration by the full court.

Other facts are stated in the opinion.

The case was submitted on briefs at the sitting of the court in December, 1907, and afterwards was submitted on briefs to all the justices.

J. K. Berry & E. C. Upton, for the plaintiffs.

J. W. Pickering, for the defendants.

RUGG, J. The bill alleges among other matters that there is a mistake apparent upon the face of the will of Mary E. Wilbur, deceased, in respect of clause "Tenth," which is: "I give and bequeath to said John F. Newton Junior one hundred (100) shares of the Boston Wharf Company, but in trust nevertheless, to hold and manage the same and pay the net income thereof to or for the use of my son, said Nathan S. Wilbur, for and during his life: and from and after his decease to pay said income to the wife of my said son, for and during her life; and upon the death of the survivor of them, my said son Nathan S. Wilbur and

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his wife, to pay, transfer and deliver said one hundred (100) shares of stock, or, in case the same shall have been sold by my said trustee, the proceeds thereof, in equal shares, to their three children, and the survivor of them, free and discharged of all trusts." The petition further alleges that at the time of the execution of the will the said Nathan S. Wilbur and his wife never had had any children, and did not have three children, as the testatrix well knew, and are now about fifty years of age, but that at the time of the execution of the will the testatrix did have in all three grandchildren, two daughters of her daughter (who are the plaintiffs) and a son (since deceased), of a son other than said Nathan S., of all of whom she was fond. The petition sets forth at length oral evidence to show that the testatrix intended her three grandchildren to be the residuary legatees after the life estate created by said clause, and that there was a mistake of the scrivener in drafting the will. The prayer is that the will may be remoulded and corrected so as to express this intent of the testatrix. The respondents demur on the grounds, among others, (1) that upon the allegations in the petition there is "no ambiguity, uncertainty or manifest error" in the language of the will, and (2) that there is no jurisdiction in equity to reform or correct an instrument once admitted to probate as a will. Both of these questions are fairly presented for determination by the pleadings. The demurrer must be sustained upon both grounds.

1. The language of a will is to be construed in the light of all the knowledge possessed by the testator as to the subject matter. Oral evidence is admissible for the purpose of showing every material circumstance attendant upon one who executes a will, in order to ascertain as nearly as possible with what purpose the words were employed. *Best* v. *Berry*, 189 Mass. 510. The testatrix knew that her son Nathan and his wife had no children, and also that she had three grandchildren, and that she was fond of all of them. Children of her son Nathan and his wife would of necessity be her grandchildren. The phraseology she used imports an unmistakable intent to give the remainder, at the expiration of the life estate, to her, the testatrix's, three grandchildren. The sentence written in the will employs an abbreviated paraphrase to express this intent. The paraphrase, as applied to the circumstances of the testatrix, taken narrowly

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and literally, is meaningless, for the reason that Nathan had no children. But she had three grandchildren, and makes clear the intent by the words actually used. This intent ought to be given effect. The exact meaning of the words, written in such a way as to express the relations more fully, is " my three grandchildren, the children of my son Nathan and his wife." The words " my three grandchildren " are by necessary intendment in the will, for the testatrix knew that they were an unavoidable part of the description. If she had used language to state fully that which the will says in brief, she would have employed the twelve words just included within the quotation marks, and the instrument may be treated as if expressed in this form. But then it appears that the words " the children of my son Nathan and his wife " are inapt, as they never had any children. It is permissible to eliminate superfluous words, when those remaining, in connection with all the circumstances, indicate the meaning intended. Discarding these words, the sense is clear, and the clause is intelligible as applied to the descendants of the testatrix. *Metcalf* v. *Framingham Parish*, 128 Mass. 370. *Morse* v. *Stearns*, 131 Mass. 389. *Millerick* v. *Plunkett*, 187 Mass. 97. *In re Smith*, 35 Ch. D. 558. *De Rosaz*, 2 Pro. D. 66. This is a sufficient ground for demurrer.

2. There is no power in equity to reform a will duly admitted to probate. The power to dispose of property by will must be exercised by an instrument in writing, except that a soldier in actual military service or a mariner at sea may make oral transmission of his personal property. R. L. c. 135, §§ 1, 6. The written instrument is the final and unalterable expression of the purpose of the testator. The power of the court is limited to interpretation and construction. It cannot make a new will. To allow the reformation of a will in favor of disappointed devisees or contesting heirs and upon such evidence as they might produce after the death of the testator, would open the door for fraud and perjury to substitute designs of interested beneficiaries for the deliberately expressed intent of a testator. It is the policy of our law to restrict rather than extend the opportunities for the establishment by oral testimony of interests in the estates of deceased persons. R. L. c. 74, § 6. It may sometimes happen that, upon undisputed facts an unfortunate mis-

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take has occurred, but a rigid adherence to a fixed and easily understood general rule will accomplish substantial justice. *Lincoln* v. *Perry*, 149 Mass. 368. *Denfield, petitioner*, 156 Mass. 265. *George* v. *George*, 186 Mass. 75. *Best* v. *Berry*, 189 Mass. 510. *Yates* v. *Cole*, 1 Jones Eq. 110. *Rhodes* v. *Rhodes*, 7 App. Cas. 192. *Karunaratne* v. *Ferdinandus*, [1902] A. C. 405, 413. *Harter* v. *Harter*, L. R. 3 P. & D. 11.

Decree of Probate Court affirmed.

Justices LORING and BRALEY agree with the majority of the court that, if a will duly executed is not in conformity with the instructions given to the draftsman who prepared it, the fact that he made a mistake does not enable the court on a bill in equity to recast the will for the testator in accordance with those directions. Having been admitted to probate, the will of the testatrix can be construed as it came from her hands, but it cannot be altered, or "remoulded" by amendments. *Boston Safe Deposit & Trust Co.* v. *Coffin*, 152 Mass. 95, 98. *Box* v. *Barrett*, L. R. 3 Eq. 244. *Charter* v. *Charter*, L. R. 7 H. L. 364, 377. *Guardhouse* v. *Blackburn*, L. R. 1 P. & D. 109. *In the matter of the Clergy Society*, 2 K. & J. 615. *Harter* v. *Harter*, L. R. 3 P. & D. 11, 22.

But they are unable to concur in what is said in the opinion as to the true construction of the will. In their view, in construing a will it is not permissible to read into the instrument words descriptive of those who are to take as legatees predicated on words found there, and then, on extraneous facts, read out the original words, and give the property to persons who are not within its provisions as admitted to probate. *Boston Safe Deposit & Trust Co.* v. *Buffum*, 186 Mass. 242, 243. The petitioners are not "children" of her son who is expressly named, but of her daughter to whom no reference is made. They cannot be brought within the bequest unless article ten is bodily reformed by the elimination, substitution and addition of words by which in legal effect this clause not only is radically recast, but is made to express an entirely different disposition of her estate. If the legatees had been described in terms which were applicable to more than one person, extrinsic evidence would have been admissible to indicate who were meant by a designa-

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tion which either wholly or partially applied to all of them. The admission of this class of evidence does not vary the will. It only places the court in a position to determine upon equivocal facts what the testator meant. *Wadsworth* v. *Ruggles*, 6 Pick. 62. *Cleverly* v. *Cleverly*, 124 Mass. 314. *Morse* v. *Stearns*, 131 Mass. 389. *Best* v. *Berry*, 189 Mass. 510, 512. A misdescription in one clause may be corrected from the language of the context when applied either to persons or property, and the will made intelligible. But a construction cannot be adopted which is directly opposed to the clear and apt meaning of the language which the testatrix chose to employ, even if when the will is applied no persons are found answering the description. *Tucker* v. *Seaman's Aid Society*, 7 Met. 188, 208. *Osborne* v. *Varney*, 7 Met. 301. *Towle* v. *Delano*, 144 Mass. 95, 98, 99.

They further deem it important to direct attention to the fact that the true construction of this will is not now decided. Until the death of the survivor of the tenants for life, that question does not arise. *Bullard* v. *Chandler*, 149 Mass. 532, 538, and cases cited. *Peabody* v. *Tyszkiewicz*, 191 Mass. 317, 322. In their opinion, the attempt to forestall the decision of the court as it may be constituted when that question is presented, is not only inadvisable, but judicially impossible.

If it were the judgment of the court that the will could be rectified according to the prayer of the bill, then, if doubtful, the question of construction might be considered. But as the court unanimously holds that the will cannot be reformed, whatever its proper construction may be, the consideration of this question is wholly unnecessary, and, the discussion of it being indecisive, forms no part of the adjudication in the case. *Cohens* v. *Virginia*, 6 Wheat. 264, 298. *Carroll* v. *Carroll*, 16 How. 275, 287.

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WILLIAM J. McGURK *vs.* GEORGE J. CRONENWETT.

Suffolk. March 4, 1908. — September 4, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Unlawful Interference. Pleading, Civil, Declaration. *Words,* "Maliciously."

The doctrine of *May* v. *Wood*, 172 Mass. 11, and of *Rice* v. *Albee*, 164 Mass. 88, that a declaration alleging that the defendant by false and malicious statements induced a third person to discharge the plaintiff or not to employ him must set out the statements in substance, is not to be extended beyond cases brought for slander or libel, and does not apply to an action for maliciously inducing a third person to break his contract with the plaintiff.

In an action for maliciously inducing a third person to break his contract with the plaintiff, it is not necessary that the declaration should set out the contract in full or by copy. A statement of its effect so far as material to the case is sufficient.

In an action for maliciously inducing a corporation to break its contract with the plaintiff, the declaration need not allege that the defendant was a stranger to the contract and was not an officer or a person in authority representing the corporation, as in either of those cases the defendant would be liable if the charges in the declaration were proved.

In an action for maliciously inducing a corporation to break its contract with the plaintiff under which he was employed as its sales manager, if a count of the declaration, after describing the contract, alleges that at a certain date "the defendant maliciously induced and persuaded said company to break said agreement and discharge the plaintiff from its employ thereunder," this with the preceding allegations states a cause of action, and the count will not be held to be bad for the lack of a direct averment that the corporation discharged the plaintiff in consequence of what the defendant did, where this is not stated as one of the grounds of demurrer. If the defendant regards the averments of the count as too meagre he has the right to ask for a bill of particulars under R. L. c. 173, § 68.

In order to maintain an action for purposely and maliciously preventing the performance of a contract, where this is the sole cause of action relied on, it is necessary to aver and prove that the defendant knew of the contract.

In a civil case where the defendant's knowledge of specific facts is essential to the plaintiff's right of action, an averment in the declaration that the act complained of was done "maliciously" does not include an averment of the defendant's knowledge of such facts.

A declaration alleging, that the plaintiff was employed by a corporation as its sales manager under an agreement in writing, and that the defendant "wrongfully without cause and maliciously prevented the plaintiff from further performing his obligation under" such contract of employment, and thus "brought about the discharge of the plaintiff" and caused the plaintiff great damage, states no cause of action, for want of an averment that the defendant knew of the existence of the agreement. Such an averment is not supplied by the use of the

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word "maliciously" which signifies only that the defendant's act was done intentionally without just cause or excuse and does not aver by necessary implication a knowledge of the agreement.

TORT for maliciously causing the Standard Plate Glass Company to break its contract with the plaintiff as stated below. Writ dated August 6, 1907.

The declaration was as follows:

"First count: The plaintiff says that on the eleventh day of July 1906 in the city of Boston, in said county of Suffolk and said Commonwealth of Massachusetts, he entered into an agreement in writing with the Standard Plate Glass Company whereby said company agreed to employ the plaintiff and the plaintiff agreed to serve said company as sales manager of its New England branch in said city of Boston from the first day of January 1907 to the thirty-first day of December 1908 at a salary of $3,600 per year payable in equal monthly instalments; that said agreement was fully performed by the plaintiff and said company until the twenty-ninth day of July 1907 when the defendant wrongfully, without cause and maliciously prevented the plaintiff from further performing his obligations under said agreement.

"And the plaintiff says that at all times from the day said agreement took effect until said twenty-ninth day of July 1907 he duly performed all conditions and obligations of said agreement on his part to be performed, and that in preventing the plaintiff from further carrying out his agreement, the defendant brought about the discharge of the plaintiff from the employ of said company and thus caused the plaintiff great damage and pecuniary loss.

"Second count: The plaintiff says that on the eleventh day of July 1906 in the city of Boston, in said county of Suffolk and said Commonwealth of Massachusetts he entered into an agreement in writing with the Standard Plate Glass Company whereby said company agreed to employ the plaintiff and the plaintiff agreed to serve said company as sales manager of its New England branch in said city of Boston from the first day of January 1907 to the thirty-first day of December 1908 at a salary of $3,600 per year payable in equal monthly instalments; that said agreement was fully performed by the plaintiff and

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said company until about the twenty-ninth day of July 1907 when the defendant maliciously induced and persuaded said company to break said agreement and discharge the plaintiff from its employ thereunder.

"And the plaintiff says that at all times from the day said agreement took effect until said twenty-ninth day of July 1907 he duly performed all conditions and obligations of said agreement on his part to be performed and that the defendant, in maliciously inducing and persuading said company to break said agreement and discharge the plaintiff from its employ thereunder, caused the plaintiff great damage and pecuniary loss."

The defendant demurred to the declaration and as causes of demurrer assigned the following:

"1. That the first count in said declaration does not show or set forth any words spoken or written by the defendant of the plaintiff, or any wrongful or malicious act, fact or circumstance done by the defendant in preventing the plaintiff from further performing his obligations under said agreement.

"2. That the first count in said declaration does not show or set forth any words spoken or written by the defendant of the plaintiff, or any act, fact or circumstance done by the defendant which brought about the discharge of the plaintiff from the employ of the Standard Plate Glass Company.

"3. That the second count in said declaration does not show or set forth any words written or spoken by the defendant of the plaintiff, or any act, fact or circumstance done by the defendant maliciously to induce and persuade the Standard Plate Glass Company to break its agreement and discharge the plaintiff from its employ.

"4. That the declaration appears to be intended as an action for slander or libel, and yet does not set forth the words written or spoken, or the substance thereof, nor does it set forth that any words were spoken or written of or concerning the plaintiff by the defendant.

"5. That the declaration does not set forth words actionable in themselves or any facts or circumstances or anything said by the defendant, or anything done by him constituting a cause of action.

"6. That the declaration does not allege that the defendant

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was a stranger to said contract between the plaintiff and the Standard Plate Glass Company and not an officer of or a person in authority representing said company.

"7. That the declaration does not set forth the entire contract between the plaintiff and the standard Plate Glass Company, nor the substance thereof."

The case was heard upon the demurrer by *Richardson*, J., who ordered that the demurrer be sustained on the first, second, third and fifth grounds thereof.

Judgment was entered for the defendant; and the plaintiff appealed. The defendant appealed from the order of the judge in that the defendant's demurrer was not sustained on the fourth, sixth and seventh grounds.

J. F. Bacon, for the plaintiff.

J. Gordon, for the defendant.

SHELDON, J. The judge of the Superior Court rightly declined to sustain the defendant's demurrer on either one of the fourth, sixth and seventh grounds assigned. It does not appear that the action was intended to be for slander or libel, or for any words or statements uttered or published by the defendant concerning the plaintiff; and the doctrine of *May* v. *Wood*, 172 Mass. 11, and *Rice* v. *Albee*, 164 Mass. 88, does not apply here. The rule of those cases ought not to be extended to actions not brought for slander or libel.

Nor is it necessary that the contract between the plaintiff and the Standard Plate Glass Company should be set out in full or by copy; its effect, so far as material to the case, was sufficiently stated.

It would make no difference in the defendant's liability, if the charges in the declaration were proved, whether he was a mere stranger to the plaintiff's contract or an officer or representative of the Plate Glass Company. The corporation was in either event a third person within the meaning of *Moran* v. *Dunphy*, 177 Mass. 485, and *Bowen* v. *Hall*, 6 Q. B. D. 333.

The second count of the declaration set forth a good cause of action within the rule of *Moran* v. *Dunphy*, 177 Mass. 485. And see the cases there cited. There are no material differences between this count and the one sustained in that case. The count cannot be held bad for the lack of a direct averment that

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the company did discharge the plaintiff in consequence of what the defendant did, because that is not stated as one of the grounds of demurrer. The averments of the count are somewhat meagre; but it must be remembered that the defendant has the right to ask for a bill of particulars under R. L. c. 173, § 68.

But different considerations apply to the first count. It contains no averment that the defendant has committed any act in itself actionable. The material averment is only that he has "wrongfully, without cause and maliciously prevented the plaintiff from further performing his obligation under" a certain agreement of employment, and thus "brought about the discharge of the plaintiff," and "caused the plaintiff great damage." There is no averment that the defendant knew of the existence of this agreement, unless that is implied in the word "maliciously." We do not doubt that there is a right of action for purposely and maliciously preventing the performance of a contract, whether of employment or otherwise. *Walker* v. *Cronin*, 107 Mass. 555. *Beekman* v. *Marsters*, 195 Mass. 205. But where, as under the count now considered, this is the sole cause of action relied on, it is essential both to aver and prove the defendant's knowledge of the contract in question. This was the doctrine of both *Walker* v. *Cronin* and *Beekman* v. *Marsters*, *ubi supra*, and of *Lumley* v. *Gye*, 2 El. & Bl. 216. And justice requires this doctrine to be upheld. A defendant who has not been guilty of conduct otherwise actionable ought not to be held liable for having brought about, though wrongfully and without cause, the breach of a contract of which he had no knowledge. It follows accordingly that this count is insufficient unless it can be said that the charge that the defendant "maliciously" prevented the plaintiff from performing his obligations under his agreement necessarily imports an allegation that the defendant knew of the agreement of which he prevented the performance.

In the opinion of a majority of the court this cannot be said. The natural meaning of the word "maliciously" is "wilfully and intentionally." *Commonwealth* v. *Goodwin*, 122 Mass. 19, 35, cited and followed in *Commonwealth* v. *Jones*, 174 Mass. 401. In a capital case tried before two justices of this court, the jury

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were told that the malice necessary to constitute the crime of murder meant simply that the act was "wilfully done for the purpose of carrying out the defendant's own ends, regardless of the rights of others"; and this was sustained by the full court. *Commonwealth* v. *Pemberton*, 118 Mass. 36, 37, 39, 40, 43. It means an intention to do an act which is wrongful to the detriment of another, according to the language of Bowen, L. J., in *Mogul Steamship Co.* v. *McGregor*, 23 Q. B. D. 598, 612, quoted by Lord Watson in *Allen* v. *Flood*, [1898] A. C. 1, 93, 94. And see *South Wales Miners' Federation* v. *Glamorgan Coal Co.* [1905] A. C. 239. So it was said by Bayley, J., in *Bromage* v. *Prosser*, 4 B. & C. 247, 255, that "malice in common acceptation means ill will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse." And it was said by this court, speaking through the present Chief Justice, of the right to dispose of one's labor as he will, that "an intentional interference with such a right, without lawful justification, is malicious in law, even if it is from good motives and without express malice." *Berry* v. *Donovan*, 188 Mass. 353, 356. And see the cases there cited; also those collected in 25 Cyc. 1667. But we have been referred to no case, nor have we found any, in which an averment that the act complained of was done maliciously has been held to include an averment of knowledge of specific facts, when the right of action depended upon such knowledge.

It follows that in the first count of this declaration there is no averment that the defendant had knowledge of the agreement between the plaintiff and the Plate Glass Company; and the count sets out no cause of action.

The judgment entered for the defendant must be reversed; the demurrer to the first count must be sustained; and that to the second count must be overruled.

So ordered.

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WASHBURN-CROSBY COMPANY *vs.* HOME INSURANCE COMPANY & another.

Suffolk. March 19, 1908. — September 4, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Insurance, Fire. *Railroad. Warehouseman.*

A policy of insurance against fire issued to a railroad corporation, which states that it is a policy "attaching upon the property, interest and legal liability" of the corporation and that it includes property held by the insured as a common carrier or warehouseman, or under any bill of lading, and property of all kinds "for which the insured may be legally liable," does not insure the interest of the owner in the goods which are held by the railroad corporation in its custody as warehouseman; and if goods so held are destroyed by a fire, which was caused by lightning and was due to no negligence of the railroad corporation, the owner of the goods cannot maintain a suit in equity against the insurance company and the railroad corporation to have the insurance of the interest of the railroad corporation applied for his benefit.

BILL IN EQUITY, filed at first in the Superior Court on July 8, 1903, removed to and filed in the Supreme Judicial Court on October 25, 1906, and amended by leave of that court on November 24, 1906, against the Home Insurance Company, a corporation organized under the laws of the State of New York and having a usual place of business in Boston, and the Boston and Maine Railroad, a corporation organized under the laws of this Commonwealth, to compel the defendant insurance company to pay to the plaintiff the value of six hundred and eighty-six sacks of flour which belonged to the plaintiff and were destroyed by fire on July 5, 1904, while in a warehouse of the defendant railroad company on Mystic Wharf in that part of Boston called Charlestown, and which were alleged to have been insured for the benefit of the plaintiff by a policy of insurance described in the bill issued by the defendant insurance company to the defendant railroad company.

The answers of the two defendants denied that the policy referred to in the bill covered any interest of the plaintiff in the property destroyed by fire, and alleged that the fire which destroyed the property was caused by lightning and was not due to any negligence of the defendant railroad company, which

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held the property in its custody as warehouseman and was not liable for its loss. The defendant insurance company filed a cross-bill alleging that it was not the intention or the agreement of the insurance company and the railroad company to insure the interest of the plaintiff in any merchandise or property, or the interest of any person other than the railroad company, but to insure only the interest and liability of the railroad company, with its charges, and that such was always believed and understood by the two companies to be the true meaning, construction and effect of the policy as written, but that, if the true construction and effect of the policy was alleged by the plaintiff, that the policy had not been written in accordance with the agreement and intention of the parties to it, and should be corrected and reformed so as to express such agreement and to cover only the interest of the railroad company and its liability, with its charges, and praying that the mistake might be corrected and the policy be reformed so as to carry out the intent and agreement of the parties thereto.

The policy was in the Massachusetts standard form. The material portions of it are quoted or described in the opinion.

The case was heard by *Sheldon*, J., who found "that the insurance mentioned in the bill was not intended to cover the interest of the plaintiff, or of other owners of property in the warehouse," and made a final decree that the plaintiff's bill be dismissed, and that the cross-bill of the defendant insurance company for reformation of the contract of insurance also be dismissed, but without prejudice to the further prosecution of the cross bill in case the decree dismissing the original bill should be reversed.

The plaintiff appealed. The evidence, taken by a commissioner appointed under Chancery Rule 85, was reported to the full court.

R. Homans, for the plaintiff.

L. S. Dabney & E. M. Parker, for the defendants, were not called upon.

LORING, J. No case has been cited by the plaintiff where the interest of a third person in property described in a policy of insurance has been held to be covered by the policy, in the absence of a provision in the policy that it is for the

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benefit of whom it may concern, or equivalent words. The words "in trust or on commission" in policies issued to warehousemen or commission merchants have been held to be equivalent words. See, for example, *Johnson* v. *Campbell*, 120 Mass. 449.

The policy in the case at bar in terms provides that it is a policy "attaching upon the property, interests and legal liability of the Boston and Maine Railroad." That is the equivalent of a statement that it is not a policy for the benefit of whom it may concern.

The plaintiff's contention is that this direct stipulation as to the character of the policy is overcome by the description of the contents of buildings which are insured by it. The argument put forward by its counsel is that the words "or held by the insured as common carriers or warehousemen, or under any bill of lading, including all charges, their own, advanced, or due to other lines of railroads or steamboats" constitute a class of insurance in addition to those described in the two previous classes, to wit, (1) "merchandise and property of all kinds (excepting furniture and fixtures and telegraphic instruments) belonging to the insured," and (2) merchandise and property of all kinds (excepting furniture and fixtures and telegraphic instruments) "for which the insured may be legally liable." That may be conceded. But these words in this policy (which is in terms confined to "the property, interests and legal liability" of the insured) are to be construed to cover property (1) not owned by the insured, and (2) property for which the insured is not liable but in which it has an interest, held by it as common carriers or warehousemen, or under any bill of lading. It is further provided that the interest of the insured (the Boston and Maine Railroad) is to include all charges, their own, advanced, or due to other lines or railroads or steamboats. See in this connection *Morrill & Whiton Construction Co.* v. *Boston*, 186 Mass. 217.

The plaintiff's counsel asked if this were so why the words "loss if any payable to said Boston and Maine Railroad" were inserted. They evidently were inserted *ex majore cautela* because the policy covered goods not owned by the Boston and Maine Railroad, for the loss of which it was legally liable.

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We find nothing in the evidence to control the plain meaning of the written contract.

The Boston and Maine Railroad did not own the flour here in question, it was not liable for it, and this suit is not brought to recover indemnity for loss suffered by the Boston and Maine Railroad because it had an insurable interest in the flour. On the contrary it is brought to compel the insured to recover indemnity for the loss suffered by the owner of the flour on the ground that its [the owner's] interest was insured by it. The entry must be

Decree affirmed.

MAURICE J. TOOHY *vs.* MARGARET McLEAN.

Middlesex. March 20, 1908. — September 4, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Negligence. Pleading, Civil, Declaration. *Elevator.*

In an action by a tailor's boy against the owner of a building used as a students' dormitory, for personal injuries caused by the sudden starting of an elevator as the plaintiff was about to enter it from the fourth floor of the building, after he had delivered a suit of clothes at the room of a student and had returned to the elevator with both arms laden with clothes for other customers, before the elevator boy, who had left the doorway of the elevator open and then had gone to attend to the wants of a tenant, had returned, the declaration contained an allegation that the plaintiff "was injured by reason of the negligence of the defendant and her servants in managing, operating and controlling said passenger elevator." The janitor of the building was called as a witness and was asked by the plaintiff, "Were there instructions in reference to leaving the elevator?" The plaintiff's counsel stated that the plaintiff's contention was, that it was "a negligent way to control an elevator to go away and leave the gate open." The judge said, "It is not open on your pleadings to rely on that," and excluded the question. *Held*, that the exclusion was error; that the allegation of the declaration above quoted, included negligence of the elevator boy in being absent from the elevator when his presence in it was required for properly managing, operating and controlling it, and that the plaintiff should have been allowed to prove the instructions given by the janitor to the elevator boy in regard to leaving the elevator.

In an action by a tailor's boy against the owner of a building used as a students' dormitory, for personal injuries caused by the sudden starting of an elevator as the plaintiff was about to enter it from the fourth floor of the building, after he had delivered a suit of clothes at the room of a student and had returned to the elevator laden with clothes for other customers, there was evidence warranting findings that the elevator was a small one, its doorway being only two feet wide,

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that it was operated by water power and was controlled by means of a lever, which worked in a slot that was set with teeth to hold the lever where it was put, that the lever was released from the teeth by raising a clutch in its handle, that when the plaintiff had entered the elevator the elevator boy took him to the fourth floor, and went with him from the elevator to open the door of the room where the plaintiff was to deliver the suit of clothes, that the elevator boy then was called to the next room to take out an empty trunk and went there, that the elevator had been leaking, and the elevator boy had left the lever outside the teeth and a little forward of the centre of the slot, to offset the leakage, that this was the proper if not the necessary way to keep the elevator still while there was a leak, that an elevator of this kind when leaking and left in this way might appear to be perfectly still, that in such a case it would move very slowly and its movements would be perceived only after an interval of time, that the lever was at the left hand side of the doorway of the elevator as one entered it, that if the lever was pushed forward quickly to its full length the elevator would go up about three hundred feet in a minute, that when the plaintiff returned to the elevator the elevator boy was not there, that, seeing the doorway open and the elevator apparently at rest, he undertook to enter it that, being encumbered by from six to nine pieces of clothing which he was carrying on both arms, he could not go straight through the two foot doorway into the elevator, and tried to get in by entering it sideways, that it was somewhat dark at the entrance of the elevator at the time, that the elevator appeared to be about four inches above the floor and to be still, that as the plaintiff attempted to enter it sideways he was, according to his own narration, "struck backward and pitched underneath" and into the elevator well, or as another witness testified, the elevator went down and then came up quickly and the plaintiff went out and down when it came up. *Held*, that there was evidence of negligence on the part of the defendant in operating a leaky elevator, in which it was necessary to leave the lever outside the teeth and forward of the centre of the slot to keep the elevator still, with the result that if the lever was pushed the full length forward or backward it would send the elevator up or down at the rate of three hundred feet a minute, that it might have been found that the elevator boy knew that the plaintiff was going back to the street by the elevator with his arms laden with clothes, and that knowing this he left the lever where it would be pushed backward or forward or both, if caught by the clothes on the plaintiff's arms as he was entering the narrow doorway, that the elevator boy left the doorway of the elevator open and went to the room where he was called to attend to the wants of the tenant, and stayed away so long that he knew or if he had exercised due care ought to have known, that the plaintiff would have returned to go down in the elevator, that the negligence of the elevator boy was in law the negligence of the defendant, and that these facts would constitute negligence, if the plaintiff might be expected to enter the elevator in the absence of the elevator boy, that such an act was reasonably to be expected, and therefore that the accident could be found to have been the probable consequence of the defendant's negligence. *Held, also*, that there was evidence that the plaintiff was in the exercise of due care, as he well might have thought that the elevator boy when he left the doorway open intended him to enter the elevator, and there was nothing to show that the plaintiff knew anything about the working of the lever or the way in which it had been left by the elevator boy, so that there was no evidence that he knew or ought to have known that there was any danger in entering the narrow elevator doorway with clothes on both arms.

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TORT by a minor, through his next friend, against the owner of a students' dormitory in Cambridge called Ridgely Hall, owned by the defendant, for personal injuries caused by the sudden starting of an elevator as the plaintiff was about to enter it from the fourth floor of that building, in the manner stated in the opinion. Writ dated June 27, 1906.

In the Superior Court the case was tried before *Hardy*, J., who at the close of the plaintiff's evidence ordered a verdict for the defendant. The plaintiff alleged exceptions.

F. J. Carney, for the plaintiff.

W. H. Hitchcock, for the defendant.

LORING, J. The facts which the jury were warranted in finding in this case were as follows:

The plaintiff, a minor, was a tailor's boy. Among other things it was his duty to collect clothes to be pressed and to deliver them when that had been done. Between four and five o'clock in the afternoon of April 25 he came to Ridgely Hall, owned by the defendant, to deliver a suit of clothes to a student living on the fourth floor. He went up in the elevator. This elevator was a small one; the floor of it was about four feet by four and one half, and its doorway was two feet wide. On the left hand of one entering the elevator and at the front end of that side, there was a lever by which the elevator was operated. The elevator was of the kind known as a plunger elevator. It consisted of a car on the top of a piston set in a cylinder. The elevator was raised by water being let into the cylinder beneath the piston, and lowered by the water being let out. The valves by which the water was let in and out were operated by the lever already spoken of. This lever was about two and one half feet high, and worked in a slot about two inches wide and eight or ten inches long. On the side of this slot was a set of teeth to hold the lever where it was put. The lever was released from the teeth by raising a clutch in the handle of the lever.

The plaintiff had some nine or twelve pieces of clothing with him when he reached Ridgely Hall on the afternoon in question. One suit was to be delivered at room 43 on the fourth floor. The plaintiff entered the elevator, the elevator boy took him to the fourth floor, left the elevator with him and opened the door of room 43 for him. The elevator boy then went to room 42, at

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the request of the tenant of that room, to take out an empty trunk, having left the lever a little forward of the centre and outside the teeth, with the clutch up and the gate of the elevator well open. The plaintiff placed the nine or twelve pieces of clothing on the railing of the balusters, took the suit for the tenant of room 48, put it on the bed in his room, and returned to the hall. He took up the remaining six to nine pieces, putting the trousers over his right arm or shoulder, running his left hand through the arm holes of the waistcoats and putting the coats over his left arm. Seeing the gate open and the elevator apparently at rest he undertook to enter the elevator. Finding that with the six to nine pieces of clothing he could not walk straight through the two foot doorway into the elevator, he tried to get in by entering it sideways. It was somewhat dark at the entrance of the elevator at the time. The elevator appeared to be about four inches above the floor and to be still. As we have said, he undertook to enter sideways, and "the next thing he knew he was struck backward and pitched underneath, that is, under the elevator into the elevator well," to quote his own words.

Another witness testified that the elevator went down and then came up quickly, and that the plaintiff went out and down when it came up. There was evidence that if the lever were pushed forward quickly to its full length, the elevator would go up about three hundred feet in a minute.

The elevator had been leaking before the time in question, and the elevator boy had left the lever outside the teeth and a little forward of the centre, to offset the leakage; and this was a proper if not the necessary way of keeping the elevator still while there was a leak. An elevator of this kind, when leaking, might appear to be perfectly still; in such a case it moves very slowly, and the evidence of its movements is attained only after an interval of time.

From these facts the jury could have inferred that the clothing carried by the plaintiff caught in the lever and caused the elevator to go up, or to go down and then up; and that the plaintiff was shot out of it by the quickness with which it went up, or down and up.

There is a preliminary question on which the ruling made at

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the trial was in our opinion wrong. The judge ruled that under the declaration in the case at bar it was not open to the plaintiff to rely on the absence of the elevator boy from the elevator in making out negligence on the part of the defendant. The negligence of the defendant alleged by the plaintiff in the first count of the declaration is that "he [the plaintiff] was injured by reason of the negligence of the defendant and her servants in managing, operating and controlling said passenger elevator." That includes negligence in the elevator boy's being absent from the elevator when his presence in it was required in properly managing, operating and controlling it. It follows that the plaintiff should have been allowed to prove the instructions given to the elevator boy.* That is settled in this Commonwealth by *Stevens* v. *Boston Elevated Railway*, 184 Mass. 476.

The initial negligence on the part of the defendant was in operating a leaky elevator. The jury were warranted in finding that this made it necessary to leave the lever forward of the centre to keep the elevator still, and at the time in question to leave the lever between two teeth and the clutch pulled up. The result was that if the lever was pushed the full length forward or backward it would send the elevator up or down at the rate of three hundred feet a minute. But the defendant's negligence did not stop there; for the negligence of the elevator boy is in law the negligence of the defendant. It might have been found that the defendant's elevator boy knew that the plaintiff was going back to the street on the elevator with his arms loaded down with clothes, and that knowing this he left the lever where it would be pushed backward or forward, or both, if caught by the clothes on the plaintiff's arms while entering this narrow doorway two feet wide, and that he left the gate of the elevator well open and went to room 42 to attend to the wants of the tenant of that room, and stayed away so long that he knew, or

* The witness was the janitor of the building. The question asked him by the plaintiff and excluded by the judge was "Were there instructions in reference to leaving the elevator?" The counsel for the plaintiff said, "Our contention is, it is a negligent way to control an elevator to go away and leave the gate open." The judge said, "It is not open on your pleadings to rely on that."

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ought to have known if he had exercised due care, that the plaintiff would have returned to go down in the elevator.

We are of opinion that these facts could have been found to constitute negligence on the part of the defendant, if the plaintiff might be expected to enter the elevator in the absence of the elevator boy. We are further of opinion that that was to be expected and therefore that the accident was the probable consequence of the defendant's negligence. The case comes within *Turner* v. *Page*, 186 Mass. 600, and similar cases, and not within *Stone* v. *Boston & Albany Railroad*, 171 Mass. 536, and cases of that kind.

We are also of opinion that the jury could have found that the plaintiff was not negligent. The plaintiff might well think that the elevator boy intended him to enter the elevator when he left the gate open. There is no evidence that the plaintiff knew anything about the working of the lever, or how it had been left by the elevator boy. In short, there was no evidence that he knew or ought to have known that there was any danger in entering the narrow elevator doorway with clothes on both arms.

The entry must be

Exceptions sustained.

DANIEL W. STEVENS *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 25, 1908. — September 4, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Negligence, Street railway. *Practice, Civil*, Exceptions. *Witness. Evidence*, Relevancy.

At the argument in this court of an exception by the plaintiff to a ruling of the presiding judge directing a verdict for the defendant at the trial of an action against a street railway company to recover for personal injuries alleged to have been received by the plaintiff from his being thrown from a car of the defendant by its sudden starting as he was standing on the step about to alight, while the car was moving slowly, at a place which was not a regular stopping place for the defendant's cars, the plaintiff contended that he had been invited by the defendant to prepare to alight before he reached the regular stopping place, and that the defendant had waived the rule, implied from the establishing of stopping places, that passengers were to alight at stopping places only. The plaintiff had made no requests for rulings at the close of the evidence at the trial, and the presiding judge

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had directed a verdict for the defendant. The only evidence appearing in the bill of exceptions to support the contentions of the plaintiff in this court was testimony of the plaintiff "that he thought the car was coming to a stop on the [side of the street before the stopping place], and, if it was to let passengers off, he would get off there, the same as they do in hundreds of places at every hour of the day," and evidence that the plaintiff had arisen from his seat and proceeded to the step from which he was thrown because the car had lessened its speed just before reaching a point where the track was intersected by another track from a cross street. *Held*, that the bill showed no error made by the trial judge, since it did not sufficiently appear from the bill that the plaintiff had tried his case upon the contention that the defendant had waived the rule as to stopping places, and, without such waiver, there was no evidence of the invitation upon which he relied.

At the trial of an action against a street railway company to recover for personal injuries alleged to have been received by the plaintiff from his being thrown from a car of the defendant by its sudden starting as he was standing on the step about to alight, while the car was moving slowly, at a place which was not a regular stopping place for the defendant's cars, the plaintiff contended that the defendant, by lessening the speed of the car, waived the rule, implied from the establishment of regular stopping places, that passengers should alight at such stopping places only; and a witness for the plaintiff was asked "What, if anything, do you know with regard to the practice of cars stopping [where the plaintiff attempted to alight] for the purpose of letting off passengers?" He answered, "I have on more than one occasion left the car there when the car has been stopped." *Held*, that the answer, not being responsive to the question, must be taken to have been intended to stand by itself, and that it did not amount to a statement that cars were stopped at the place mentioned for the purpose of letting off passengers.

At the trial of an action against a street railway company to recover for personal injuries alleged to have been received by the plaintiff from his being thrown from a car of the defendant by its sudden and negligent starting as he was on the step about to alight, it appeared that the car was approaching a point where the track was intersected by another track from a cross street, and had lessened its speed, and the plaintiff testified that the car started up with such "terrific" force that, holding on to the handle beside the step, he was swung around against the body of the car, and a witness for the plaintiff testified that, when the plaintiff got upon the lower step, "almost immediately the car shot across the street," dragging the plaintiff three or four feet before his hold was broken. The car stopped at its regular stopping place one hundred and twenty feet from where the plaintiff was thrown. *Held*, that there was no evidence which would warrant a finding that the car was started up negligently.

At the trial of an action against a street railway company to recover for personal injuries alleged to have been received by the plaintiff from his being thrown from a street car of the defendant as he was about to alight, at a place which was not a regular stopping place, the presiding judge excluded the following question asked of a witness other than the plaintiff: "At the time when the plaintiff stepped from the platform down on to the step and was on the step, what do you say with regard to where you expected the car was going to make the stop?" *Held*, that the exclusion was proper, since it was irrelevant what inference the witness might draw from the facts before his mind.

TORT for personal injuries alleged to have been received by the plaintiff by the negligent starting of an electric street car of

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the defendant when he was in the act of alighting therefrom. Writ in the Superior Court for the county of Suffolk dated July 6, 1905.

There was a trial before *Lawton*, J. At the close of the evidence, which was stated in the opinion, the presiding judge directed a verdict for the defendant, and the plaintiff excepted. The plaintiff made no requests for rulings at the trial.

J. S. Farlow, for the plaintiff.

H. J. Hart, for the defendant.

LORING, J. The plaintiff, a man seventy-one years of age, was a passenger on one of the defendant's closed cars going east over Boylston Street in Boston about 10.55 P. M. on April 2, 1905. After passing Exeter Street he signalled the conductor to stop at Dartmouth Street. The white post indicating the stopping place for Dartmouth Street is east of the crossing, and the plaintiff knew that a track runs north and south on Dartmouth Street in front of the Public Library, and joins the track here in question to the west of the crossing at Dartmouth and Boylston Streets, the switch for the Dartmouth Street track being near the place where the accident happened. As the car approached the crossing, but while it was some way off, the plaintiff, together with a young man and one Gray, left their seats and went out on to the back platform of the car. The young man got off while the car was in motion. After this young man got off the plaintiff got down on to the step, when "the car started with such terrific force — I had my hand on the handle on the body of the car — it swung me around against the body of the car and I fell," to quote the plaintiff's own words. The plaintiff also testified that "he thought the car was coming to a stop on the Library side, and if it was to let passengers off, he would get off there, the same as they do in hundreds of places, at every hour in the day, and he thought that if he could get off he would get off on that track, on the southerly side of the street, because it would be a hundred feet nearer where he wanted to go." He testified further "that he did not see any one else on the car who was thrown at all; that the seats of the car were not entirely filled prior to the accident."

The only other witness called by the plaintiff was Gray, already spoken of. He testified: "That the car had begun to slow down when the young man took his place upon the step;

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that when he dropped off [the] car wheels were barely revolving; Mr. Stevens then took the step, and almost immediately the car shot across the street." Gray also testified "that the plaintiff was dragged probably three feet or so by the car before his hold was broken." The car came to a stop at the regular stopping place for Dartmouth Street, about one hundred and twenty feet east of the place where the accident happened.

The plaintiff has contended that he was invited to prepare to alight on the west side of Dartmouth Street. He relies in this connection on his testimony "that he thought the car was coming to a stop on the Library side, and if it was to let passengers off he would get off there, the same as they do in hundreds of places, at every hour in the day." His contention is that this was evidence that the defendant had waived the rule (implied from establishing stopping places) that passengers were to alight at stopping places only; and that under those circumstances slowing up as this car did was an invitation to get ready to alight on the wrong side of Dartmouth Street. Unless the defendant had waived the rule that passengers were to alight at the white posts and at the white posts only, slowing up to run over a switch and cross-over and to cross a street is not an invitation to alight. As to the contention that there was evidence of such a waiver, it is enough to say that we are of opinion that this sentence of doubtful meaning, standing alone, is not sufficient to show that the plaintiff tried his case on that ground in the court below, and there is nothing else in the bill of exceptions to indicate that he did so. The burden is on the excepting party to show that an error was made. *Zamore* v. *Boston Elevated Railway*, 198 Mass. 594. The plaintiff is not aided in this connection by Gray's testimony that he repeatedly had left cars on that side of Dartmouth Street "when the car has been stopped." That means nothing more than that when the car has been stopped, not to let passengers off but for some other reason, he had taken advantage of the situation to get off at a place where he was not invited to get off. That this is all Gray meant to testify to is plain from the question put and the answer given. His answer was not responsive to the question put and must be taken to have been intended to stand by itself.

"Q. What, if anything, do you know with regard to the prac-

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tice of cars stopping on the further side, or the out-of-town side of Dartmouth and Boylston Streets, for the purpose of letting off passengers? A. I have repeatedly left the cars myself there. . . . I have on more than one occasion left the car at the place you mention when the car has been stopped."

The question in the case at bar therefore comes to this: Did the evidence of the plaintiff go far enough to prove that the motorman was negligent in the way in which he started the car after it had been properly slowed down to go over the Dartmouth Street switch and to cross Dartmouth Street within the rule laid down in *McGann* v. *Boston Elevated Railway*, *ante*, 446, and cases there cited.

The car came to its usual stopping place, one hundred and twenty feet from the place of the accident. No one else on the car was shown to have been thrown about by the starting of the car. Gray testified that almost immediately the car shot across the street, and that the plaintiff was dragged three feet or more before his hold was broken. The plaintiff testified that the car started with such terrific force that he was swung round against the body of the car, and that at the time he had his hand on the handle on the body of the car. That is all.

The plaintiff's testimony that the car started with such terrific force as to swing the plaintiff round on to the body of the car does not go far enough. How great that force was the jury had no means of knowing. The plaintiff expected to get off on the wrong side of the street, and for that reason he apparently was not prepared for the ordinary jolt which accompanies the ordinary starting forward of an electric car. This does not go far enough to prove that the start here in question was a negligent rather than an ordinary one. Gray's testimony does not carry the evidence much, if any, farther. All that he testified to was that the car "shot forward." When these descriptions of the start are taken in connection with the conceded facts in the case, we are of opinion that the plaintiff's evidence did not warrant a finding that the defendant's motorman was negligent in the way he started the car. See in this connection *Foley* v. *Boston & Maine Railroad*, 193 Mass. 332; *Jameson* v. *Boston Elevated Railway*, 193 Mass. 560; *Weinschenk* v. *New York, New Haven, & Hartford Railroad*, 190 Mass. 250; *Timms* v. *Old Colony*

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Street Railway, 188 Mass. 198; *Byron* v. *Lynn & Boston Railroad*, 177 Mass. 303. The evidence referred to by the court in *McDonough* v. *Boston Elevated Railway*, 191 Mass. 509, went further than that in the case at bar.

The judge was right in excluding this question to the witness Gray: "At the time when Mr. Stevens stepped from the platform down on the step and was on the step, what do you say with regard to where you expected the car was going to make the stop?" In no event was it of any consequence what inference was drawn by the witness from the facts before his mind.

Exceptions overruled.

WILLIAM H. ADAMS *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. March 26, 27, 1908. — September 4, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Negligence, Employer's liability, Railroad.

At the trial of an action against a railroad company by an engine driver in its employ, to recover for personal injuries received by him because of the derailment of the engine which he was driving, alleged to be due to a defective condition of the engine, the following facts were testified to by the plaintiff: He not only was experienced as an engine driver, but also was experienced in and familiar with the mechanical construction of engines. Three to five days before the accident he reported to the defendant the defective condition of the engine, which was that the breast beam had sunk so low that the forward "truck frame was down on the boxes." He noticed then that the flanges of the front wheels had cut into the breast beam, and realized that the result of such a condition was that the front wheels were likely to become fixed and unable to turn in rounding a curve. The accident happened on a trip from Plymouth to Boston. He had examined the engine before starting from Plymouth and had observed that it had not been repaired. At the time of the derailment he was running at the rate of from forty-four to forty-eight miles an hour around a three degree curve. He also testified that he did not appreciate that there was any danger in running the engine in such a condition at such a rate around such a curve. *Held*, that the plaintiff's injuries were as much due to his own as to the defendant's negligence, and that as a matter of law the plaintiff, with his knowledge and experience, was not in the exercise of due care if he did not appreciate the danger of his running the engine under the circumstances as he did.

TORT by an engine driver of the defendant to recover for personal injuries alleged to have been received by him because

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of the derailment of an engine which he was running, due to alleged negligence of the defendant. Writ in the Superior Court for the county of Suffolk dated July 14, 1905.

There were five counts in the declaration. The case was submitted to the jury on the second count only, which was a count at common law and alleged as negligence of the defendant failure to furnish for the plaintiff's use suitable machinery and appliances, and to keep them in proper repair.

There was a trial before *Harris*, J. Such of the evidence as is material for the decision of the case is stated in the opinion. At the close of the evidence, the defendant among other requests asked the presiding judge to direct a verdict for the defendant upon the grounds that the plaintiff was not in the exercise of due care, that he had assumed the risks incident to the running of the locomotive in the condition described by him, and that the defendant was not negligent. The request was refused. The jury found for the plaintiff, and the defendant excepted.

J. L. Hall, for the defendant.

J. H. Vahey, (*P. Mansfield* with him,) for the plaintiff.

LORING, J. The plaintiff in this case was the engine driver of a passenger train on the defendant's road, which left Plymouth for Boston at 11.56 A. M., on September 29, 1904. By his own story he left South Weymouth for South Braintree three minutes behind time, with a determination to get to South Braintree on time if possible. The distance was three and a half miles and the schedule time was six minutes. That is to say, on his own testimony he was trying to make three and a half miles in three minutes; but the jury were warranted in finding, on other testimony given by him, that when he went round the curve where the accident happened he was going forty-five to forty-eight miles an hour only. The engine left the rails at a three degree curve, and the plaintiff was badly injured.

The sole ground on which the plaintiff finally went to the jury was that the defendant was negligent in not making the necessary repairs on the engine when he (the plaintiff) "reported it" to Mr. Perkins, the general foreman of the engine house in question. "At that time the engine was running low forward on the truck frame, which means that the frame of the forward truck was down on the boxes of the engine — being down causes the

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breast beam to run on the flanges of the forward truck wheel," to use the plaintiff's own words as to the condition of the engine when he "reported it." He testified and the jury were warranted in finding that he not only made this verbal report but that he entered a written report in the book kept by the defendant for that purpose. That book had been lost or mislaid. The plaintiff's testimony was: "I told him that engine 837 was running low forward, that the truck frame was down on the boxes, and it was on the book." "The flanges of the wheel had cut into the breast beam and I noticed that but didn't make a report of that — that the flanges had cut into the breast beam."

It appeared that the engine had gone into the repair shop for general repairs on July 20 of the same year, and had been there until August 27, four weeks and five days before the derailment in question.

The plaintiff's story was that three or five days before the accident and not before then, he noticed that the engine was low forward, was riding hard and stiff, and that the flanges had cut into the breast beam and the angle iron. He said that the flanges had cut into the breast beam from three quarters of an inch to an inch, and that when the engine was at rest the breast beam was from one quarter to three eighths of an inch above the flange of the wheel.

The plaintiff testified that he was fifty-five years of age and had been "running an engine for about twenty-nine years, running all kinds of passenger and freight engines all over the road. Most of the time I have been a passenger engineer; I have been in the various round houses where the engines were stored; I have worked in the round house at South Boston, work that was ordered for me to do in the way of making repairs on locomotives, and on all parts of the locomotives. Have applied for two patents on engines. If they had a surplus of engineers they would put me to work in the round house. I am practically familiar with all parts of an engine, know how they should be constructed and put together, the same as all engineers. I am not a master mechanic. The repairs that I made were the usual running repairs that are reported and need tending to; that I could do myself by being requested."

The plaintiff on the stand explained at length the construc-

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tion of an engine and the danger incident to running an engine where the breast beam was liable to fall down on to the flanges of the forward wheels. If that happened the forward truck is held straight ahead and cannot turn under the superstructure of the engine, as it must do to run around a curve. In such a case nothing is left for the engine but to ride the iron and go off the track.

He testified that he examined the engine each day; that each time he examined it he found that no repairs had been made, and that he took the engine out after discovering its condition, including the day of the accident. His exact words were: "I had seen it upon the third and second day before the accident and noticed that the buffer was against the flange and that the trucks had not been raised." He also examined the engine at Plymouth on the day of the accident, before leaving for Boston, as well as at Boston before leaving for Plymouth. He then "discovered that the pony trucks were still low and in the same condition in Plymouth and I made no report of that except as I have already said on the fifth day before the accident. I didn't run on the fourth day. By riding stiff and hard I mean that the engine was riding like a tip cart; she was hung up forward so she didn't get the elasticity of the springs to ride easy. She rode stiff and hard and had been riding stiff and hard from three to five days."

The plaintiff was a skilled man in engines and the running of them, and knew all that the defendant knew or was chargeable with knowing. He testified indeed that he did not have any knowledge or appreciation that there was any danger in running that engine in the condition it then was in and in the manner in which he was using it. As matter of law one who knew what the plaintiff knew of engines was not in the use of due care if he did not know and appreciate the danger in running the engine in the condition it then was in and in the manner in which he was then using it.

The plaintiff and the defendant stood on an equal footing so far as negligence is concerned. If it was negligence for the defendant not to raise the engine including the breast beam, it was negligent for the plaintiff to run the engine when it was not raised. The plaintiff has argued that the defendant was

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negligent because from the fact that the breast beam had come down on the forward wheels it was liable to come down again, and that he was not negligent because while it was at rest there was a clearance of one quarter to three eighths of an inch. He contended that there was a clearance of an inch to an inch and three eighths; that in getting the clearance you must add the depth of the cut which had been made in the breast beam. But in this he was wrong. As soon as the flange enters the cut the superstructure is caught. The truth is that it was negligence on the part of both the plaintiff and the defendant to run the engine when it was known or ought to have been known that the breast beam was liable to come down on the flange. And of the two the plaintiff was the more negligent, (although that is of no consequence,) because, knowing this, he ran his engine around a curve at forty-five to sixty miles an hour.

For these reasons we are of opinion that the presiding judge should have directed the jury to find a verdict for the defendant.

Exceptions sustained.

ALLAN M. BROWN *vs.* JAMES F. HADDOCK, ALEXANDER A. SANBORN, intervening petitioner.

JAMES A. KING *vs.* CHARLES F. BAXTER.

Suffolk. June 16, 1908. — September 4, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Mechanic's Lien. Statute. Words, "Consent."

At the trial of issues framed for a jury regarding two petitions for the establishment of liens for work performed, and one for labor performed and materials furnished, in the construction of buildings upon certain land, there was evidence tending to show the following facts: In June of a certain year one B. owned the land. At that time one H. made an agreement in writing with a certain bank that the bank should make loans to H. in instalments as work upon buildings to be erected by him on the premises in question progressed, the loans to be secured by a mortgage upon the premises. In July of the same year B. agreed in writing with H. to sell to him the land and to convey it on or before January of the next year "free from all incumbrances, except" a restriction as to the nature of buildings to be erected thereon, H. to pay a part of the purchase price in cash, and B. to take a mortgage on the premises as security for the payment of the remainder. Thereafter, and before conveyance by B. to

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H., they together examined plans for the buildings, and B. approved of them, knew that H. was to procure money from the bank for their construction, and knew that work was being done on the premises and that materials were being furnished for the erection of the buildings by various parties under contracts with H. Such contracts were made by the petitioners and all work for which liens were claimed by two of them was performed and two stories of two buildings on the premises were put up before B. conveyed to H. All work done and materials furnished by the third petitioner was done and performed after such conveyance. At the same time that the conveyance was made, H. gave a first mortgage to the bank and a second mortgage to B. Subsequently, and before the petitions were filed, B. entered to foreclose his second mortgage. No notice in writing had been given to B. by any of the petitioners before any of the labor was performed or furnished or the materials furnished. *Held*, that the jury were warranted in finding that the labor performed and materials furnished by the petitioners were performed and furnished with the consent of B., who was the owner of the land when the petitioners' contracts were made with H., also that the seisin of H. "was not instantaneous as against B.," and that the liens should be established.

Under Pub. Sts. c. 191, § 1, now R. L. c. 197, § 1, the consent of the owner of land, or of any person having authority from or rightfully acting for such owner, which is required for the establishment of a mechanic's lien for labor performed or furnished or for materials furnished in the erection, alteration, repair or removal of a building or structure upon such land, is consent to the performance of the work or to the furnishing of the materials, not to the creation of a debt for such labor or materials.

One, who had an entire contract with the owner of certain land for the performance of labor and furnishing of materials for the construction of a building thereon, performed labor, and then filed in the registry of deeds the certificate required by Pub. Sts. c. 191, § 6, stating that he had a claim for both labor performed and materials furnished, but not itemizing the claim for labor. Afterwards he brought a petition to establish a lien for the labor performed only, at the trial of which it was agreed that there was no intention on the part of the petitioner to mislead, and that the respondent was not misled, "by reason of an inaccuracy in stating or failing to state the contract price, the number of days of labor performed or furnished and the value of the same." *Held*, that the inaccuracies in the certificate did not prevent the establishment of the lien.

TWO PETITIONS, filed in the Superior Court for the county of Suffolk March 22, 1901, and April 17, 1901, respectively, for the establishment of mechanics' liens on property at the corner of Bowdoin and Greenbrier Streets in that part of Boston called Dorchester. An intervening petition was filed in the first case on June 1, 1901.

The certificate filed in the registry of deeds by the intervening petitioner Sanborn claimed a lien for "labor performed and materials furnished" upon the premises, the charge in the account reading, without items, "To furnishing and erecting steam heating apparatus . . . as per contract."

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The certificate filed in the registry of deeds by the petitioner King claimed a lien for "labor performed and furnished under an entire contract" by which the petitioner was to excavate cellars, "furnish and lay stones including materials for the cellar walls, . . . etc."

The certificate of the petitioner Brown claimed a lien for labor only, according to an account annexed.

The petition of Sanborn sought to establish a lien for both labor and materials in the performance of the entire contract described in his certificate, which was alleged to have been made with Haddock; that of King sought to establish a lien only for labor performed under the entire contract described in his certificate, which was alleged to have been made with Haddock, "who had authority from and was acting for Baxter"; and that of Brown sought to establish a lien for labor performed.

The cases were referred to and tried together before an auditor on issues framed by the court. The auditor filed a report in which he found, in brief, that on June 8, 1900, before he had agreed with Baxter to purchase the property in question, Haddock made an agreement in writing with the Boston Penny Savings Bank according to which the bank was to lend him $7,000 in certain proportions as the buildings progressed on each house which he was to build on the property. On July 15, 1900, Haddock and Baxter made an agreement in writing whereby Baxter agreed to sell and Haddock to purchase the property, the agreement providing that the lots were to be conveyed before January 1, 1901, by Baxter, he to convey "a good and clear title to the same free of incumbrances, except" a restriction as to the nature of the buildings to be erected thereon, and that Haddock was to pay a certain proportion of the price in cash upon delivery of the deed, the balance to be secured by a mortgage.

Deeds from Baxter to Haddock as to various lots into which the premises were divided, first mortgages as to each lot from Haddock to the Boston Penny Savings Bank and second mortgages to Baxter were recorded simultaneously on August 15 and September 14, 1900. On March 2 and 18, 1901, Baxter entered to foreclose under his second mortgages, and sold the premises at foreclosure sale under said mortgages, he being the purchaser.

Further findings in the report were as follows:

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Previous to the time of the conveyance of the lots from Baxter to Haddock, they both contemplated the erection of buildings by Haddock on the property, and Baxter had knowledge of the kind of houses to be erected, had seen the plans of the houses and approved of them, and had knowledge that the money was to be procured by Haddock from the Boston Penny Savings Bank, which bank was to hold first mortgages on the property. Baxter gave the lines for the building on the corner of the streets to an employee of said King, saw certain trees being cut on the premises, knew that work was being done on the premises prior to the conveyance of the property from him to Haddock, and knew that labor and materials were being furnished by sundry parties under contracts with Haddock for the erection of said buildings on said premises. The buildings on two of the lots were up to and beyond the second story before the conveyances were made from Baxter to Haddock. Haddock could not get any money from the bank on the first mortgages until the buildings were up to a certain point, and Baxter knew that fact. Baxter knew that he could not get any money from Haddock in payment of the land until Haddock got the money from the bank on account of the mortgage. The contracts of King and Brown were made with Haddock previous to the conveyances from said Baxter to Haddock, and therefore, as to each of the petitions of King and of Brown on the issues framed for the jury, he found: (1) The labor of the petitioner furnished before the delivery of the deed from Baxter to Haddock was furnished with the consent of the owner. (2) Baxter at the time of the delivery of the deeds of the premises described in the petition from him to Haddock knew that Haddock was building houses on the said premises. (3) The contract between Baxter, or some person acting for him, and the petitioner, referred to in the petition, was made prior to the time of the delivery of the deeds of the premises described in the petition from Baxter to Haddock. (4) The labor of the petitioner which was furnished after the delivery of the deed from Baxter to Haddock was furnished with the consent given prior to the delivery of said deed of the owner at the time of such consent. (8) No notice in writing was given by the petitioner to the owner of the property before any of the materials [or labor] were furnished by the petitioner.

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In regard to the lien of Sanborn, on the issues framed for the jury, the auditor found that no labor or materials of the petitioner were furnished on the respective lots before the delivery of the deeds as to such lots from Baxter to Haddock; and made other findings to the same effect as those numbered two to eight with regard to the other petitions.

The respondent Haddock was defaulted.

At the trial, which was before *Schofield*, J., the auditor's report was introduced in evidence. There was other evidence tending to corroborate the auditor's findings.

At the close of the evidence, the respondent Baxter requested the following rulings:

(1) That upon all the evidence the jury must find that Baxter gave no consent to the creation of mechanics' liens upon the property described in the petition.

(8) "That the fact that the agreement between Baxter and Haddock provided that Baxter should convey the lots to Haddock by a good and clear title free from incumbrances except the restriction stated in the agreement and that Baxter should take a second mortgage from Haddock subject only to a first mortgage on each lot for a part of the purchase money, with the fact that such deeds and mortgages were given by Baxter and Haddock respectively covenanting that the lots were free from all incumbrances, was in the absence of direct proof that Baxter ratified Haddock's contracts with petitioner, inconsistent as a matter of law with the creation of liens having priority to said mortgages or that Baxter gave consent to Haddock to incumber the title of the property by liens ahead of said mortgage."

(7) The "consent" of the owner or of some one acting for the owner in the laws relating to mechanics' liens must mean a consent to the creation of a debt for the labor or materials furnished.

The requests were refused and the issues framed were submitted to the jury, who found as had the auditor; and the respondent Baxter alleged exceptions.

After verdict on the issues and at the hearing before the presiding judge on the matter of the decree, the parties agreed "that, in the matter of the certificates filed in the registry of deeds by the petitioners King and Sanborn, the respondent Baxter admits that, in filing said certificates by said petitioners, there

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was no intention to mislead and that he, said Baxter, was not in fact misled by reason of an inaccuracy in stating or failing to state the contract price, the number of days of labor performed or furnished and the value of the same; but said Baxter had only the knowledge of the particulars of the labor and materials furnished by said King and Sanborn as found by the jury and as stated in his testimony before the jury as shown in the bill of exceptions."

On motions by the petitioners, judgments and sales of the property were ordered, and the respondent Baxter appealed.

The case was submitted on briefs.

W. B. Grant, for the respondent Baxter.

A. S. Hayes & A. G. Sleeper, for the petitioner Sanborn.

S. Keyes, for the petitioner Brown.

C. F. Eldredge, for the petitioner King.

KNOWLTON, C. J. The question argued by the respondent is whether there was evidence to warrant a finding that the labor and materials furnished by two of the petitioners, and the labor furnished by the other petitioner, were furnished with the consent of the respondent Baxter, who was the owner of the real estate at the time when their respective contracts were made. The report of the auditor on this point, the testimony of the respondent himself, and the other evidence in the case, not only well warranted, but almost required this finding, under the rule of law stated in *Davis* v. *Humphreys*, 112 Mass. 309, *Carew* v. *Stubbs*, 155 Mass. 549, *Smith* v. *Norris*, 120 Mass. 58, *Worthen* v. *Cleaveland*, 129 Mass. 570, and *Hilton* v. *Merrill*, 106 Mass. 528.

The respondent's seventh request for a ruling was rightly refused. The petitioner was not called upon to show consent of the owner to the creation of a debt for the labor or materials furnished, but only his consent to the furnishing of the materials or the performance of the labor in the erection of a building on his real estate. Pub. Sts. c. 191, § 1. R. L. c. 197, § 1. In the language of the opinion in *Vickery* v. *Richardson*, 189 Mass. 53, 55, the consent required "is to the performance of the work, not to the lien, or the amount for which under it the interest of the owner in the land can be charged."

The respondent's contention as to the inaccuracy in the certifi-

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cate is met by the agreed statement of facts and by the decision of this court in *Devine* v. *Clark*, 198 Mass. 56. See also *Smith* v. *Norris*, 120 Mass. 58; *Vickery* v. *Richardson*, 189 Mass. 53.

Inasmuch as the contract of Sanborn to furnish materials was made with the consent of the owner of the real estate and of the contractor that bargained for them, who became the owner of the real estate before the materials were furnished, so that the contract was made with the person who was the owner when they were furnished, it was not necessary to give a notice of an intention to claim a lien to the former owner who subsequently had acquired a different interest under a mortgage. *Carew* v. *Stubbs*, 155 Mass. 549.

Apart from this, the trial judge rightly found that the respondent's title by mortgage was not acquired under a mortgagor who had only an instantaneous seisin. Before the respondent's mortgage took effect, the mortgagor had made an important contract with the holder of the first mortgage, whereby he had acquired rights to be exercised in the use of the property, and had given rights in it. In this respect the case comes within the decision in *Libbey* v. *Tidden*, 192 Mass. 175, 185.

Exceptions overruled; orders of judgment and sale affirmed.

JEREMIAH M. MORAN & another *vs.* THOMAS F. GALLAGHER.

Worcester. September 3, 1908. — September 4, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Intoxicating Liquors. License. Real Estate. Words, "Owner."

The owner of the fee in a public street forty feet wide, which is immediately in front of certain premises, is an "owner of real estate within twenty-five feet of the premises," against whose objection, made in accordance with R. L. c. 100, § 15, no license to sell intoxicating liquors to be drunk on such premises can be granted.

PETITION, filed in the Supreme Judicial Court for the county of Worcester June 12, 1908, for a writ of certiorari to set aside

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the action of the respondent, judge of the Police Court of Fitchburg, in revoking a license, which had been granted to the petitioners by the board of license commissioners of that city, to sell intoxicating liquors to be drunk on the premises.

There was a hearing before *Rugg*, J., who reserved the case for consideration by the full court.

The case was submitted on briefs.

D. I. Walsh & T. L. Walsh, for the petitioners.

C. F. Baker & E. W. Baker, for the respondent.

KNOWLTON, C. J. This is a petition for a writ of certiorari to set aside an order of the Police Court of Fitchburg, revoking a license of the petitioners to sell intoxicating liquor to be drunk on the premises. The order was made under the R. L. c. 100, § 15. It is undisputed that the Simonds Manufacturing Company, the applicant before the police court for a revocation of the license, had duly objected to the granting of the license, as an owner of real estate within twenty-five feet of the premises described in the application for the license. The only question that arises under the present petition is whether it was such an owner of real estate within the meaning of the statute.

It appears that it was the owner of the real estate on the opposite side of the street, which was forty feet wide at that point, and it was also the owner of the fee of the entire street in front of the property described in the application for a license. It had a perfect title to the land in the street, subject to an easement of the public to use it for travel. The precise question is whether the existence of such an easement in land within twenty-five feet of the premises described in an application for a license leaves the owner of the fee with such a title as is necessary to constitute him an owner of the real estate within the meaning of the statute.

There is no doubt that in a general sense he is the owner, and "has a right to the enjoyment of any use of his estate consistent with the servitude to which it is subjected, and may maintain trespass for any interruption of his enjoyment." *O'Linda* v. *Lothrop*, 21 Pick. 292, 297. *Proprietors of Locks & Canals* v. *Nashua & Lowell Railroad*, 104 Mass. 1, 9, 11. He may build his cellar under the highway. *Allen* v. *Boston*, 159 Mass. 324, 335. See also *Commonwealth* v. *Morrison*, 197 Mass. 199.

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If the highway or street is discontinued, his title immediately becomes absolute.

If the contention of the present petitioners could be maintained, there would be ground for a similar contention against an owner of land subject to the easement of a private way, especially if the persons entitled to use the way were numerous. It might be argued that other burdensome easements would have the same effect to deprive the owner of his right, under the statute, to object to the issuing of a license.

We are of opinion that the Simonds Manufacturing Company was plainly the owner of the land in the street, within the ordinary meaning of the word. There is no good reason for holding that the word is used in the statute otherwise than in its ordinary signification, and the entry must be

Petition dismissed.

OLD DOMINION COPPER MINING AND SMELTING COMPANY *vs.* ALBERT S. BIGELOW.

Suffolk. September 3, 1908. — September 4, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Equity Pleading and Practice, Amendment, Decree. *Res Judicata.*

In a suit in equity, while appeals by both the plaintiff and the defendant from a decree made by a single justice of this court, ordering the defendant to pay to the plaintiff a certain sum of money, were pending before the full court, the defendant applied to this court for leave to file a supplemental answer setting up a judgment of another court, rendered after the appeals were taken, as a bar to the plaintiff's claim. It was *ordered,* that the decree be vacated, and that the case be remitted for hearing before a single justice upon the question whether the defendant should be allowed to file the supplemental answer, and, in case such filing should be allowed, for further hearing after the filing of the supplemental answer upon the matters set up in that answer, and for reversal or such modification of the original decree, if any, as ought to be made by reason of these matters, or for reservation for determination by the full court of the questions arising upon the supplemental answer.

BILL IN EQUITY, filed in the Supreme Judicial Court on October 7, 1902, a description of which will be found in 188 Mass. 816–820.

The case was reserved upon demurrer for determination by

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the full court. On June 19, 1905, the demurrer was overruled by a decision reported in 188 Mass. 815.

On December 10, 1907, after a hearing on the merits, *Sheldon*, J., made a decree that the plaintiff should recover from the defendant a sum of money found by the justice to be due to it from him, with interest from a date named, and that execution should issue against the defendant for the total sum with costs. On December 24, 1907, the plaintiff appealed. On January 6, 1908, the defendant appealed.

While the appeals were on the docket of the full court, the defendant made a motion to be allowed to file a supplemental answer setting up as a bar to the plaintiff's claim a judgment of the Circuit Court of the United States for the Southern District of New York entered on July 23, 1908, in a suit in equity entitled *Old Dominion Copper Mining & Smelting Co.* v. *Frederick Lewisohn & others, executors.*

Arguments were heard upon the motion at a special sitting of the full court at Boston on September 8, 1908.

On September 4, 1908, the court made the following order:

"ORDERED, that the clerk . . . make the following entry . . . viz.:

"The defendant having made an application for leave to file a supplemental answer, the decree is vacated and the case is remitted for hearing before a single justice upon the question whether the defendant shall be allowed to file the supplemental answer, and, if his motion for leave to file the supplemental answer is allowed, for a further hearing upon the matters set up in this answer, and for reversal or such modification of the original decree, if any, as ought to be made by reason of these matters. After the hearing or hearings the original decree, unless reversed, is to be entered with or without such modification, and the parties shall have the same right of appeal as they had when the decree was first made, or the justice may reserve for the full court the questions that arise upon the supplemental answer."

C. G. Littlefield (of New York) *& A. Hemenway*, (*J. W. Farley* with them,) for the defendant.

L. D. Brandeis & E. F. McClennen, for the plaintiff.

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COMMONWEALTH *vs.* FRANK J. TYLER.

Suffolk. June 16, 1908. — September 8, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Automobile. Park Commissioners. Statute.

The power which was granted to the board of park commissioners by St. 1875, c. 185, § 8, "to make rules for the use and government" of the parks and parkways, which still was in force after the enactment of St. 1903, c. 473, § 8, regulating the operation of automobiles throughout the Commonwealth, remains unaffected by St. 1905, c. 366, § 1, with regard to the regulation of speed of automobiles, which, although not so expressed in terms, must be regarded as an amendment of St. 1903, c. 473, § 14, or by St. 1906, c. 412, § 1, which amended St. 1903, c. 473, § 8.

COMPLAINT, signed and sworn to in the Municipal Court of the Brighton District of the city of Boston November 21, 1907, charging the defendant with driving an automobile at a rate of speed not permitted by the rules and regulations of the park commissioners of the city of Boston.

On entry of the case after appeal to the Superior Court, the defendant filed a motion to quash the complaint, which was heard and denied by *DeCourcy*, J.; and the defendant appealed.

The case was submitted on briefs.

A. P. Teele, for the defendant.

I. Isaacs, Assistant District Attorney, for the Commonwealth.

MORTON, J. The defendant was arrested on a warrant issued by the Municipal Court of the Brighton District of the city of Boston upon a complaint charging that he rode and drove "an automobile on Commonwealth Avenue in said Boston . . . other than between Arlington and Beacon Streets, the said avenue being then and there a public reservation in charge of the park commissioners of the city of Boston, and did then and there ride and drive said automobile at a rate of speed exceeding twelve miles an hour contrary to the rules and regulations of said commissioners, and the form of the statute in such case made and provided." At the trial in the municipal court the defendant was found guilty and sentenced to pay a fine of $15. He appealed to the Superior Court, and in that court he duly filed a motion

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to quash the complaint on the ground, first, that the park commissioners had no authority to regulate the speed of automobiles, and that the complaint set forth no offense known to the laws of this Commonwealth; second, that the complaint contained no reference to the statute authorizing the park commissioners to regulate the speed of automobiles, and was not drawn in conformity to St. 1903, c. 473, and amendments thereof, which, it is alleged, supersede all other authority on the part of the park commissioners over public and private ways in this Commonwealth. The motion to quash was denied and the defendant excepted. There was a verdict of guilty and the defendant was duly sentenced, but the presiding judge certified that in his opinion there was reasonable doubt whether the sentence should stand, and ordered the execution thereof to be stayed till the further order of the court.

If the park commissioners had authority to make rules and regulations affecting the speed of automobiles, it is not contended that they had not jurisdiction of that portion of Commonwealth Avenue where the offense charged is alleged to have been committed; but the defendant contends that the effect of St. 1906, c. 412, § 1, was to divest the commissioners of the authority which this court held in *Commonwealth* v. *Crowninshield*, 187 Mass. 221, was given to them by St. 1875, c. 185, § 8, and which the court also held, in substance and effect, was not changed or modified by St. 1902, c. 315, or St. 1903, c. 473. The argument is that the language of St. 1906, c. 412, § 1, "Every person operating an automobile or motor cycle on any public or private way laid out under authority of law," is broad enough to include streets in parks and streets connected with parks; that there is no saving clause in St. 1906, c. 412, in relation to park commissioners as there was in St. 1903, c. 473, and is in St. 1905, c. 366; that St. 1903, c. 473, § 14, which contained a saving clause as to park commissioners was repealed by St. 1905, c. 366, § 2; that St. 1905, c. 366, is an independent statute having no relation to the rates of speed at which automobiles may be driven; and that, there being now no saving clause as to the park commissioners in any of the statutes relating to the speed of automobiles, it follows that they had no right to make any regulations concerning the speed of auto-

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mobiles in the parks or streets connected therewith under their jurisdiction. The defendant also contends that the policy of the Commonwealth has changed so that, instead of the rate of speed being now an arbitrary one, the question is, in substance in each case, whether the rate of speed was under the circumstances reasonable as regarded the safety of the public and the use of the way by other persons and vehicles. But the short answer to these contentions is, it seems to us, that St. 1906, c. 412, § 1, is an amendment of St. 1903, c. 473, § 8, and that St. 1905, c. 366, § 1, must be regarded, though it is not expressly so declared, as an amendment of St. 1903, c. 473, § 14, which act as amended is still in force, and that by St. 1905, c. 366, § 1, the rights of park commissioners are expressly saved. This renders it unnecessary to consider what the construction of the statute relied on by the defendant would be if the saving clause in regard to the park commissioners contained in the amendatory act of 1905 were not to be regarded as incorporated into St. 1903, c. 473. As thus amended St. 1903, c. 473, has the same effect so far as regards the right of park commissioners to make rules and regulations concerning the speed of automobiles as the statute, as it originally stood, had. And as already observed the court held in effect in *Commonwealth* v. *Crowninshield*, *supra*, that there was nothing in it that affected the right of the commissioners to make such rules and regulations. We find nothing in any of the statutes relating to the operation of automobiles showing an intention on the part of the Legislature to divest park commissioners of the authority which they had under St. 1875, c. 185, § 3, to make rules and regulations concerning the speed at which automobiles may be driven in parks and streets under their jurisdiction. St. 1902, c. 315. St. 1903, c. 473. St. 1905, cc. 311, 366. St. 1907, cc. 203, 408, 494, 580.

The other grounds on which the motion to quash was based, namely, those relating to the sufficiency of the complaint, have not been argued and we, therefore, treat them as, in effect, waived.

Judgment affirmed.

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JAMES T. MOORE *vs.* DANIEL G. RAWSON & others.

Suffolk. June 16, 1908. — September 15, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Partnership. Good Will. Sale. Equity Jurisdiction, For an accounting.

Statement by KNOWLTON, C. J., of the effect of the sale of the good will of a partnership under a decree of court where the affairs of the partnership are wound up by reason of the death or bankruptcy of one or all the partners as distinguished from the effect of a voluntary sale of an interest in a business including the good will, the character of the good will for which the defendants in the present case were liable to account to the plaintiff being the same as if they had acquired it at a sale under a judicial decree.

The purchaser of the good will of a partnership sold under a judicial decree acquires the right to use the firm name for the purpose of designating the business carried on by him as a continuation of that done by the old firm, but the exercise of this right is subject to the limitations necessary to protect the rights of the former partners of the old firm, such as that expressed in R. L. c. 72, § 5, and the purchaser has no right to use the name of the old firm in such a way as to indicate that the business is being conducted at that time by persons who have no connection with it. Each member of the old firm has the right to use his own name in a new business, either alone or with the names of others who are associated with him, but only the purchaser lawfully can use the firm name as an indication that his business is a continuation of that of the old firm.

R. L. c. 72, § 5, providing that "a person who carries on business in this Commonwealth shall not assume or continue to use in his business the name of a person formerly connected with him in partnership or the name of any other person, either alone or in connection with his own or any other name or designation, without the consent in writing of such person or of his legal representatives," does not interfere with the right of a purchaser of the good will of a partnership sold under a judicial decree to advertise as the successor to the former firm.

In a suit in equity by one of the partners of a dissolved firm against his former copartners for an accounting, if it appears that on the termination of the partnership the defendants wrongfully appropriated to their own use the whole property of the partnership including the good will and continued to carry on the same business using the firm name without change, the plaintiff's right to an accounting for his share of the good will is not affected by the fact that, if the good will of the old firm, including the right to use the firm name to show succession, had been sold to other persons, the defendants might have used the same name to designate a new firm.

A purchaser, at a sale under a judicial decree, of the assets of a partnership, including a list of customers of the firm, and of the good will of the business, acquires the right to use the list as a means of increasing his business, and the partners of the old firm, although they may establish a competing business, have no right to compel the purchaser to furnish them a list of the customers of the old firm or to submit such a list for their examination.

In a suit in equity by one of the partners of a dissolved firm against his former

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copartners for an accounting, if it appears that on the termination of the partnership the defendants wrongfully appropriated to their own use the whole property of the partnership including the good will and continued to carry on the business as their own, and if among the assets of the firm taken into possession by the defendants there was a list of the customers of the firm, the defendants are bound to account to the plaintiff for the use of this list and the enjoyment of business derived from its use.

By a dissolution under the terms of a partnership agreement one of the partners was forced by the other partners to retire, and the remaining partners refused the retiring partner an accounting, and, forming a new partnership in which they took an additional partner into the firm, continued the business, using the retired partner's share in the property and good will of the old firm as a part of their working capital. In a suit by the retired partner against his former copartners for an accounting, this court held that the defendants must account to the retired partner, not only for his share of the partnership property including the good will, but also for his share in all the actual profits derived from the property, or must pay him interest on his share of the capital, if he should so elect. In ordering that the case should be recommitted to the master, this court intimated that, in computing the actual profits in which the plaintiff was entitled to share, such a sum might be deducted from the net profits as the master should find was attributable solely to the skill and services of the defendants. The plaintiff elected to take his share of the profits instead of interest on his money. The master, to whom the case was recommitted, reported that the evidence did not enable him to determine how much, if anything, should be allowed to the defendants as compensation for their services. *Held*, that, on all the facts of the case, the culpability of the defendants was not so great as to leave them with no right to compensation for their services, and that they equitably were entitled to an allowance, that, although the evidence did not give a precise standard for the measurement of the value of the defendants' services, it showed that something should be allowed to them, and that it was the duty of the master to determine what was a reasonable compensation, that, by fixing a fair price for such services in ordinary cases, it would be possible to determine whether, in view of the results of the business, more or less than the usual compensation should be allowed as the part of the income that ought to be attributed to the services of the partners as distinguished from the part which was earned by the capital of the partnership, and that for this purpose the services of the new partner should be treated as if rendered by the defendants. It was ordered that the case again should be recommitted to the master to determine what allowance should be made to the defendants for their skill and services and to state the account accordingly.

BILL IN EQUITY filed in the Supreme Judicial Court on March 14, 1872, by a former partner of the firm of D. G. Rawson and Company, engaged in manufacturing boots and shoes in Worcester and selling them at a store on Pearl Street in Boston, who on December 20, 1871, had been forced out of the firm by his copartners under a dissolution of the partnership in accordance with a provision of the articles of copartnership, for an accounting.

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A summary of the history of this case, which was begun more than thirty-six years ago, will be found in the opinion of *Braley*, J., at pages 268, 273, 274 and 275 in the report of the case in 185 Mass. 264. The following statement of some of the facts in the case is taken from the same opinion:

"After the dissolution by the enforced withdrawal of Moore, no change was made, but the defendants continued the business as before, until December 31, 1872, when a new partnership was formed, consisting of four persons; three of whom were the retiring partners of the old firm and the defendants in this case. No change, however, was then made either in the firm name, which continued to be that of 'D. G. Rawson & Co.,' or in the place where the business was located, and the defendants took over the assets of the old firm, not for the purpose of liquidation, but for use in their business. And the customers who had patronized the first, continued to trade with them and the second partnership.

"The plaintiff retired, not only from the firm, but also from the business that it carried on, while the defendants retained the old place of business, and conducted it under the old firm name.

"In other words, no change apparent or real was made in an enterprise which was transferred bodily from the old partnership to the new, except that one partner was obliged to retire under the terms of the old contract, and after a short period, by a new agreement, another was taken in his place."

"As the trial proceeded before the different masters, at some stage of the proceedings it appeared that the defendants had used the share of the plaintiff, including not only the first amount found by the master, but that amount increased by the value of his interest in the good will in their business, . . ."

"When the plaintiff demanded an accounting, and that his share of the assets should be ascertained and paid to him, the demand was met with a denial of such a right, and a refusal to grant his request. He was obliged to resort to a bill in equity to compel the defendants to do what by implication under their contract, which contained no provisions for a settlement of the partnership on its termination, they had agreed to perform upon a dissolution of the firm at their option; and after which, with

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the plaintiff's assent, they became bound within a reasonable time to wind up and settle the affairs of the partnership, and pay him his proportionate part.

"No pretense was made by them that in good faith they had taken the partnership property at a fair valuation, and were ready to state the account on that basis, but they refused to pay anything, absolutely ignored him, and treated the property as their own."

It was held that the defendants must account to the plaintiff for his share of the good will as well as in all the other assets which they took over for use in their own business, and also for his share in all actual profits derived from the property, or must pay him interest on his share of the capital, if he should so elect. It also was held that the court in its discretion might allow the defendants in accounting for the actual profits to deduct from the net profits such a sum as should be found to be attributable solely to their skill and services in conducting the business. It was ordered that the case should be recommitted to the master to make the necessary computations and findings, and state the result in a final report.

On January 8, 1908, the case came on to be heard, upon the master's second report and the exceptions thereto, before *Morton*, J., who, by agreement of the counsel for the parties, reserved and reported it for determination by the full court, such decree to be entered as justice and equity might require.

The case was submitted on briefs.

G. R. Swasey & W. P. Thompson, for the plaintiff.

J. B. Warner, for the defendants.

KNOWLTON, C. J. The fundamental fact that the defendants are bound to account to the plaintiff for the good will of the partnership business was established when this case was formerly before this court. *Moore* v. *Rawson*, 185 Mass. 264. It was said that "the attitude of the defendants, up to the time of the payment of the money into court, was evidently that of a general denial of any right of the plaintiff to an accounting." It was held that the plaintiff's demand of his share in the assets of the firm, taken in connection with the other facts and circumstances of the case, was enough to entitle him to be paid for his interest in the good will, as well as in all the other assets which they took

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over "not for the purpose of liquidation, but for use in their business." See also *Griffith* v. *Kirley*, 189 Mass. 522.

The first question of importance relates to the manner of estimating the value of the good will, and particularly its value in reference to the right to use the firm name. It is held, both in this State and in England, that a sale of the good will of a partnership, under a decree of the court, when the affairs of the partnership are wound up by reason of the death or bankruptcy of one or of all of the partners, carries with it everything of advantage belonging to the existing business relative to the continuance of it, but leaves the several members of the firm at liberty to start a new business of the same kind which will come into competition with the business of the purchaser. It is to be assumed that the members of the firm, or some of them, may desire to start such a business in the same neighborhood. One who voluntarily sells his interest in a business, together with the good will, impliedly agrees that his relations to the business are ended, and that all the advantages belonging to it as a going concern are to pass to the purchaser, and that he himself will not do anything to interfere directly with it as property having a good will which will be valuable to the purchaser. One selling in such a way puts himself in the attitude of retiring from business, so far as his activity would directly affect that which fairly might be considered as belonging to the business at the time of the sale and giving it value for his successor.

It is often a very difficult question to determine how far this implied agreement goes in its application to the facts of a particular case. Such questions were considered in *Webster* v. *Webster*, 180 Mass. 310, and in cases there cited. See also *Old Corner Book Store* v. *Upham*, 194 Mass. 101, 105, and *Foss* v. *Roby*, 195 Mass. 292. An answer to the question requires a consideration of what is fairly included in the good will, in view of the situation of the parties and the implications involved in the terms of the contract. Sometimes very little, if anything, is meant, beyond what is included in a sale of the good will under a judicial decree in settling the business of a partnership. But usually, in this Commonwealth, there is an implied agreement not to set up a competing business that will directly interfere with the business to be carried on by the purchaser of the good will. In England, a

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competing business may be set up by the seller of the good will; but he is not permitted to solicit business from the customers of the old firm. See *Webster* v. *Webster*, *ubi supra*; *Hutchinson* v. *Nay*, 187 Mass. 262, and cases cited; *Foss* v. *Roby*, 195 Mass. 292.

In the present case the partnership was dissolved, and the good will owned by the members of the firm was such as might have been sold under a judicial decree if the business had been settled by a receiver. If there had been such a sale, either of the partners would have had a right afterward to establish a new business of the same kind, and to solicit trade from customers of the old firm. *Hutchinson* v. *Nay*, 187 Mass. 262. It is the good will that would have passed under such a sale for which the defendants are accountable in this suit.

The questions principally discussed relate to the right of a purchaser of the good will to use the firm name. The right to use the firm name, for the purpose of designating the business carried on by a purchaser as a continuation of that done by the old firm, passes with a sale of the good will. This is an exclusive right. The limitations upon its exercise are only such as are necessary to protect the rights of the partners or others. Such a limitation is expressed in R. L. c. 72, § 5. The purchaser has no right to use the name in such a way as to indicate that the business is then being conducted by persons who have no connection with it. Each member of the old firm, like everybody else, has a right to use his own name in a new business, either alone, or with the names of others who are associated with him. But after a sale of the good will, no one but the purchaser can lawfully use the firm name as an indication that his business is a continuation of that of the old firm. *Lothrop Publishing Co.* v. *Lothrop, Lee & Shepard Co.* 191 Mass. 353, 355. A convenient way of using the firm name by a purchaser of the good will, if rights of third persons are involved, is by advertising as the successor to the former firm. The statute permits this. *Martin* v. *Bowker*, 163 Mass. 461. See also *Hoxie* v. *Chaney*, 143 Mass. 592; *Sohier* v. *Johnson*, 111 Mass. 238. Such a use of the name implies that the business continued by the successor retains the valuable and attractive features which it possessed under the former proprietor. It implies that everything that

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enters into the good will of the business continues in it, so far as it can in any business which is wound up by legal proceedings in the lifetime of the partners.

In fixing the value of the good will the master treated the right to an exclusive use of the firm name as included in the good will for the appropriation of which the defendants must account. At the request of the defendants he also made certain alternative findings which we need not consider. Upon the important point in issue he found, among other things, as follows: "If the good will had been sold at the time of dissolution, I apprehend that the purchaser could have lawfully announced that he had 'purchased the good will of the business conducted for some years past and up to December 31, 1871, under the following name and style, namely: D. G. Rawson and Company', and further I apprehend that the purchaser could have done this, even if it be true, as the defendants contend, that under the statute, (R. L. c. 72, § 5,) the purchaser could not assume or continue to use in his business the name of D. G. Rawson without his consent in writing. And further I apprehend that in the event of a sale as above, D. G. Rawson might establish a new business and do so under his own name; but that he could not lawfully hold himself out as the same D. G. Rawson and Company who had conducted the business of 1870 and 1871, or as the successor to the good will and business of that firm. If he were to resume business, it would be a new business that he was starting, not an old business that he was carrying on or continuing. That old business had been sold when the good will was sold. Of course, he could announce that he, D. G. Rawson, was the same D. G. Rawson who had formerly been concerned in the business of 1870 and 1871."

It often happens, on the dissolution of a partnership and the formation of a new one which purchases the good will and continues the business, that the former firm name is continued, without anything to indicate a change in the partnership. All that this legitimately means, or can mean, is that the new firm is the successor to the old one, continuing the same kind of business and enjoying its good will. If it purported to mean that there had been no change in the partnership, it would be, to that extent, a fraud upon the public. A purchaser of the good will of a

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business sold by order of a court gets a right to the exclusive use of the firm name in the only way in which such a name can ever be used legitimately, as between a new firm or a new proprietor and the public, namely, to show a direct succession to the business, with all its valuable features.

The defendants in the present case continued the use of the firm name without change. They enjoyed, and must pay for, the only use of a firm name that can be made fairly, after a partnership has been dissolved. This right is not affected by the fact that these defendants might have used the same name to designate a new firm, if the good will of the old firm, including the right to use the firm name to show succession, had been sold to other persons. We are of opinion that there was no error in the decision of the master on this part of the case.

The hypothetical questions* were rightly admitted, and there is nothing to show that the elements of value entering into the good will were not properly considered.

The defendants requested the master to rule and find that "If any right to use the list of customers and enjoy their custom survived the dissolution of the firm, nevertheless it was not an exclusive right belonging to the firm, but the defendants were entitled to it without any obligation to account to the plaintiff for its enjoyment; or, if obliged to account at all, its value is to be determined as not exclusive in character." The master refused this request on the ground that it asked for a ruling on a question of law which he was not called upon to decide, and added that, if it was essential for him to express any opinion

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* These were very long questions, reciting the facts which the plaintiff's evidence tended to prove, and calling for the opinion of the witness as to the value of the business of the partnership at certain dates, as to the value of the share of the outgoing partner in the good will of the business at the time of dissolution on December 20, 1871, and as to the fair value that the remaining partners should pay for the good will of the partnership of 1870 which they appropriated to themselves on December 20, 1871.

The defendants objected to each of these questions on the ground that they included many elements not proper to be considered in estimating the value of the good will or were immaterial in the case, and on the further ground that the questions excluded other elements necessary to be considered and assumed rulings and findings of the court which had not been made in the case.

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upon the question, he ruled that the language of the request did not state the law as he understood it. The request assumes that, among the assets which were taken into possession by the defendants, there was a list of customers of the firm. There is no doubt that a sale of the assets, including such a list, under a decree of the court, together with the good will of the business, would have given the purchaser a right to use the list as a means of increasing his business. Without the purchase he would have had no access to the list. After the purchase the former partners, although they might establish a new competing business, would have no right to compel the purchaser to furnish them a list of the customers of the old firm, or to submit a list for their examination. The defendants, in reference to the obligation to pay for the list, and the good will whose value was increased by the possession of it, stand in the position of purchasers at a sale of the assets and good will. If they had been purchasers, the plaintiff, as a former member of the firm, could not have availed himself of this list, although he might have set up a competing business and solicited such old customers as he could find. The master was, therefore, right in refusing to rule that the defendants were not bound to account for the use of this list and the enjoyment of custom derived from its use.

The defendants' exception to the master's refusal to adopt Rule I.* must be overruled. It is not true that the liability of the defendants for good will is not affected by their use of the firm name. They exercised the right of a purchaser of the good will, to use the name as an indication of succession to the busi-

* The rule referred to, which the master refused to adopt at the request of the defendants, was as follows:

"Rule I. The defendants having paid the plaintiff for the assets of the firm in December, 1873, except a balance of $13,529.28, and being now held accountable for this balance separately from good will, and being held liable also for all profits obtained by them from the use of the plaintiff's money and the use of his share of the good will, their liability for good will is not affected by their use of the assets or firm name, their retention of the plaintiff's money, their appropriation of the business, or any alleged wrongful conduct of theirs at or after the dissolution or by any events subsequent to that time; but good will is to stand as an article to be estimated at its own intrinsic value at the moment of dissolution, independent of any of those considerations."

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ness and of a continuance of it, presumably with the desirable features formerly belonging to it.

Other exceptions upon this branch of the case need not be considered particularly.

The next question is whether the master was right in refusing to allow anything to the defendants for their skill and services in conducting the business after the dissolution, whose profits from the use of the capital the plaintiff is permitted to share in the proportion that his capital used in the business bears to the whole. Under the former decision of the case in 185 Mass. 264, the plaintiff is given his election, either to have interest on his money, or the income derived from the use of it. Having elected to take the income, it is necessary to ascertain how much of the earnings are fairly imputable to the use of the capital. Under the former decision the master was directed to determine whether the defendants were equitably entitled to any allowance for their skill and services in conducting the business. The court did not deal with the facts so far as to decide whether, in the exercise of its discretion, such an allowance should be made. The general rule to be applied in such cases was considered in *Robinson* v. *Simmons*, 146 Mass. 167, where an allowance was made. If a person carrying on a business, using in part the capital of his former partner, acts in good faith, and the former partner elects to receive what his money has earned, it is equitable to take into account in determining the earnings, not only what expenses have been incurred in the business, but what is a fair compensation, in view of all the circumstances, for services rendered by the proprietor of the business.

In the present case, although the court in the former opinion intimated that the conduct of the business in the beginning was not free from culpability, it intimated at the same time, without deciding, that this culpability was not so great as to leave the defendants with no right to compensation for services. Taking all the facts of the case as they now appear, we are of opinion that the defendants are equitably entitled to an allowance which will diminish the amount found due the plaintiff in the master's report.

The master has reported that the evidence does not enable him to determine how much, if anything, should be allowed the de-

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fendants. Plainly it does not give a precise standard for the measurement of values. But, in our opinion, it shows that something should be allowed. It will not be more difficult to determine what is a reasonable compensation for such services as were rendered than to ascertain a *quantum meruit* in many other cases. When a fair price is fixed for such services in ordinary cases, it will be possible to determine whether, in view of the results of the business, more or less than the usual compensation should be allowed as the proportion of the income that ought to be imputed to services of the partners, as compared with that which capital should receive when services and capital are united in a joint enterprise. Services rendered by the new partner, Hazlewood, will be treated, for this purpose, as if rendered by the defendants.

We discover no other error in the master's method of stating the account.

Case to be recommitted to the master to determine what allowance should be made to the defendants for their skill and services, and to state the account accordingly.

MONEYWEIGHT SCALE COMPANY *vs.* FELIX C. McBRIDE.

Suffolk. March 24, 1908. — October 19, 1908.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Equity Jurisdiction, To enjoin public officer. *Public Officer. Sealers of Weights and Measures. Constitutional Law*, Police power, Executive and judicial functions.

A suit in equity cannot be maintained to enjoin a public officer from deciding a question committed by statute to his decision on the ground that he threatens to come to a wrong conclusion. If in deciding the question he should proceed on erroneous principles of law, his decision could be quashed on certiorari, or in some cases a writ of mandamus might issue directing him to take specific action, but this court has no jurisdiction to take from him the duty of deciding the question.

A bill in equity will lie to enjoin a public officer from taking action injurious to the plaintiff's rights of property under a statute which is unconstitutional.

It would be a proper exercise of the police power for the Legislature to forbid the sale of incorrect tables of value to be used by dealers as correct tables

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of value in making sales of articles by pounds and ounces, and equally so to prohibit the sale of such a table when it is made a part of an automatic self-computing scale.

The act of a sealer of weights and measures in determining the correctness of a table of weights and values which is required to be arithmetically correct is ministerial in character.

A statute, which should require the sealers of weights and measures to pass upon the commercial correctness of self-computing scales or other devices and to determine finally the question how great a departure from mathematical accuracy is permissible in fixing the values of small articles sold by weight without making the transactions commercially and therefore legally incorrect, and also to determine the question whether a table of values, which are only commercially correct because they disregard fractions of a cent, is a proper basis for finding the true weight of articles sold by the cent's worth, would be unconstitutional, these being judicial questions which cannot be left to the final determination of an executive officer.

St. 1907, c. 535, providing that all scales, balances, computing scales and other devices having a device for indicating or registering the price as well as the weight of the commodity offered for sale, shall be tested by the sealers of weights and measures as to the correctness of both weights and values indicated by them, requires that the values thus indicated shall be correct arithmetically and shall not disregard fractions of a cent.

Under St. 1907, c. 535, providing that all scales, balances, computing scales and other devices having a device for indicating or registering the price as well as the weight of the commodity offered for sale, shall be tested by the sealers of weights and measures as to the correctness of both weights and values indicated by them, the correctness to be passed upon is purely arithmetical and the statute for that reason is constitutional.

LORING, J. On October 1, 1907, an act of the General Court (St. 1907, c. 535) went into effect entitled "An act to provide for the testing and sealing of weights, measures and balances having a device for indicating the price as well as the weight of commodities offered for sale." By § 1 it is provided that R. L. c. 62, relating to testing and sealing weights, measures and balances "shall apply to all scales, balances, computing scales and other devices having a device for indicating or registering the price as well as the weight of the commodity offered for sale. All such computing devices shall be tested as to the correctness of both weights and values indicated by them." By § 2 it is provided that "a sealer or deputy sealer shall seal such devices when tested and found correct, or shall mark, condemn or seize such devices if incorrect," in accordance with R. L. c. 62; and all penalties imposed for violation of the provisions of R. L. c. 62, relative to weights, measures and balances shall apply to such devices.

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On November 29, 1907, this bill in equity was brought by the plaintiff, an Illinois corporation, against the sealer of weights and measures of the city of Cambridge. The bill in substance alleges that it is the sole vendor of weighing and value indicating scales manufactured by the Dayton Company of Ohio, known as barrel shaped computing scales and manufactured on what is called the secondary principle; that the weights and values indicated by them are correct and accurate; that it has sold large numbers of them in Cambridge, in Massachusetts and in the United States generally, on the conditional sale instalment plan; and that money is still due the plaintiff on many of these sales. The bill further alleges that the defendant intends to condemn all secondary principle barrel shaped computing scales, and seeks to have him enjoined from so doing. The defendant filed an answer which in substance denied that the aforesaid scales were correct and accurate in the values therein set forth. Issue was joined. The case was heard on the merits, the evidence was taken by a commissioner, a decree was entered dismissing the bill, and the cause is now before us on an appeal from that decree.

The plaintiff and the defendant have argued at length the correctness of the kind of computing scales here in question. But the correctness of these scales is not now before us. The decision of that question is committed by the statute to the sealers of weights and measures of the several cities and towns of the Commonwealth. If a sealer of weights and measures in deciding that question should proceed on erroneous principles of law, his decision could be quashed on certiorari, and in some cases a writ of mandamus might issue directing him to take specific action. See for example *Darrigan* v. *Williams*, 198 Mass. 457. But there is no jurisdiction in this court to take from the public officer selected by the act the duty of deciding the question committed to him for decision by the act, on the ground that he threatens to come to a wrong conclusion. That is what this plaintiff asks the court to do so far as the correctness of the threatened decision by the defendant (as sealer of weights and measures for the city of Cambridge) is concerned.

There is however a second ground on which the plaintiff seeks to maintain this bill in equity, namely, that St. 1907, c. 535, is

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unconstitutional. That question is properly raised by a bill in which the plaintiff seeks to have the defendant enjoined from taking action under it which will affect his rights of property. *Board of Liquidation* v. *McComb*, 92 U. S. 531. Such a bill proceeds on the same footing as a bill to enjoin a public officer from doing an act *colore officii* which is in fact and in law outside his jurisdiction. See for example *Owens* v. *Crossett*, 105 Ill. 354; *Wetherell* v. *Newington*, 54 Conn. 67; *Morgan* v. *Miller*, 59 Iowa, 481; *Belknap* v. *Belknap*, 2 Johns. (Ch.) 463.

In passing upon this second question the arguments put forward on the first question are pertinent although that question is not now directly before us. No better way can be found for demonstrating what the statute has committed to the final decision of the three hundred and fifty-four sealers of weights and measures of the cities and towns of the Commonwealth than to state the arguments which have been made here on the question which those officers have to decide. We speak of the question which has been finally committed by St. 1907, c. 535, to the three hundred and fifty-four sealers of weights and measures because there are thirty-three cities and three hundred and twenty-one towns in the State.

Before taking up the arguments put forward here upon the correctness of these computing scales, it is necessary to understand what they are. As we have said, the scales made by the plaintiff are self-computing scales, built on what has been styled the secondary principle. Scale No. 63 was taken at the trial as a type of these scales. The chart indicating the value of the several weights is the thing on which the correctness or incorrectness of this scale depends, so far as it registers the prices.

A facsimile, somewhat reduced in size, of portions of this chart is printed on the opposite page.

The centre is duplicated in the portions given because the limits of a single page do not admit of otherwise reproducing a facsimile.

The large figures, 23 — 0 — 1, reading down on the left of the centre, and 13 — 12 — 11, reading up on the right of it represent the pounds, and the intermediate figures 4, 8 and 12, the ounces, which the article put upon the scale weighs. The figures in the several columns in alignment with the one-pound line,

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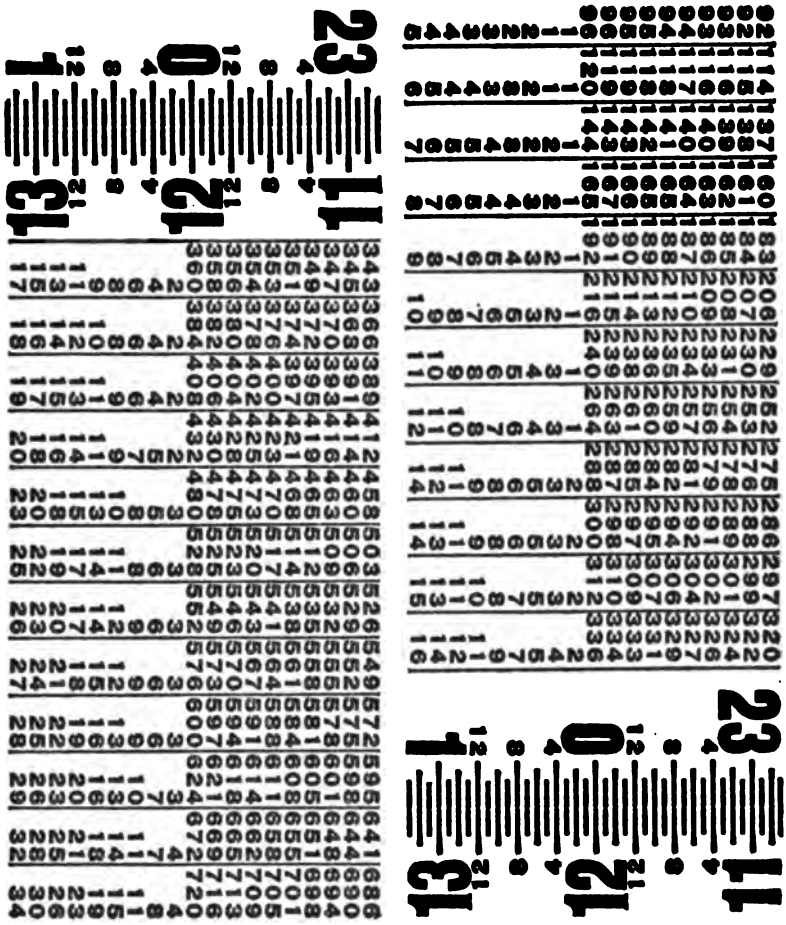
for example, represent the value of one pound at the prices there stated. We assume (although it is not so stated in the evidence) that the first of the two figures 18 means 12½.

This chart is put around a small barrel or drum which contains a set of balances and springs which weigh the article, the



weight and value of which are to be stated by the scale in question.

For example, if the article weighs 23 pounds 4 ounces, and is 14 cents a pound, the operator finds the value by looking at the figures in the 14 cent a pound column opposite that weight, and he finds it to be 326 cents.

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The drum on which this chart is rolled is under a cover. That cover, on the side of it next to the dealer, has a slit extending across the whole chart, to enable him to read the value as well as the weight of the article put upon the scale. There is also a slit on the customer's side of the drum, which enables him to see the centre of the chart, that is, the weight and the weight only. The reason why the figures on the two sides of the centre are in inverse order is to enable the same figures to appear on the opposite sides of the chart at one and the same time.

Scale 63, in the words of the plaintiff's principal witness, is intended "for the butcher and market trade." As will be seen on inspection, it indicates each ounce of the meat or other piece of provisions sold, and the value of each two ounces at the several prices for which the chart is drawn up, when meat or other provisions are sold by weight. The evidence showed that scale 63 and a similar scale numbered 61 are also used, and are intended by the plaintiff to be used, to indicate the correct weight when so many cents' worth of meat or other provisions at a specified price are asked for by the customer and sold by the dealer. This evidence also showed that among the poorer classes this method of dealing is not an infrequent one.

The numbers given in the centre column confessedly state with correctness the weight of the article on the scale. As a scale the machine is correct.

The several numbers given in alignment with every two ounces are confessedly commercially correct values where an article is sold by weight. The plaintiff contends that they are correct within the meaning of St. 1907, c. 585. The defendant contends that the values indicated for the odd ounces are in many cases not even commercially correct. What is meant by these two contentions is best shown by an example. Suppose a customer asks for half a pound of cheese at 11 cents a pound. A piece is cut off a cheese and placed upon the scale, and the indicator in the centre shows that it weighs 9 ounces. The same indicator will be exactly half way between two lines, one in alignment with 8 ounces and the other in alignment with 10 ounces. In the case put it will be exactly between the figures $\frac{6}{7}$. The

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price indicated by the chart is half way between 6 and 7 cents, that is to say, 6½ cents. The half cent cannot be paid in addition to 6 cents nor returned if the customer pays 7 cents. Under the commercial custom, which is the plaintiff's sole justification for the figure 6 on the chart now in question and for similar figures placed upon it (as we shall see hereafter more at length), the dealer takes the half cent and charges the customer 7 cents for his cheese.

In point of fact the value of the cheese in the case put is $6\frac{8}{16}$ cents, and under the commercial custom the fraction being less than half a cent belonged to the customer, not to the dealer. The amount legally due for the piece of cheese in question is 6 cents.

The reason why the chart (in the case put above) gives $\frac{3}{16}$ of a cent to the dealer in place of giving $\frac{8}{16}$ of a cent to the customer, is that a fraction of a cent in favor of the dealer is included in the figure 6 opposite 8 ounces. Eight ounces at 11 cents a pound are 5½ cents. The chart gives the dealer the benefit of the half cent and calls eight ounces 6 cents. Therefore, when the dealer taking the mean between 6 cents and 7 cents for 9 ounces finds that the price is 6½ cents, and takes to himself that half cent, he gets a fraction of a cent twice.

The plaintiff's first answer to this is that this is a dishonest use of an honest chart, that it is dishonest to use a commercially correct figure as an arithmetically correct figure, and that if that be done it is not the chart that is to blame but the dealer who uses it dishonestly.

That argument assumes that the ordinary dealer knows that some of the prices on chart 63 are commercially correct and some arithmetically correct. More than that, that argument assumes that the ordinary dealer knows which of the 4,608 prices on chart 63 are commercially and which are arithmetically correct. Still further, that argument assumes that the ordinary dealer in using the chart can and will in the hurry of business carry in mind which of the prices are commercially and which are arithmetically correct, and, in ascertaining the price not stated in terms on the chart but indicated upon it by the marker coming between two of the prices placed thereon, will bear in mind which prices are commercially and which are arithmetically

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correct, and take to himself or give to his customer the benefit of the fractions accordingly.

There is nothing on this chart that tells the dealer who buys it that some of the prices are not arithmetically correct. In the absence of such a notice the ordinary dealer would not even necessarily know that any of them are not arithmetically correct. But when the other two assumptions underlying this argument are reached, namely, that some prices on it are only commercially correct and the dealer using it should not only know which are arithmetically and which are commercially correct, but should act upon that in the hurry of business in giving or taking the fractions when fractions are involved in the value of odd ounces, it may well be urged that the argument cannot carry the load put upon it and collapses.

The next answer made by the plaintiff's counsel is that the dealer has no right to use the chart to get the value of the odd ounces.

Apart from special directions from the plaintiff, it might well be thought that when the indicator points to an odd ounce on this chart, exactly half way between the even ounces, it indicates that the value of the odd ounce is exactly half way between the values given for the even ounces, and that the defendant is chargeable with knowledge that that is the meaning of the chart in such a case, and is chargeable also with knowledge that dealers will so understand and use it.

But this was not the only answer made to this argument of the plaintiff. The other answer made was that the plaintiff has told purchasers of its machines to do the very thing which it now says ought not to be done, and which, if done, it now says is wrong, and which (it now says) is the wrong of the dealer and not its (the plaintiff's) wrong. There was evidence that on June 14, 1906, the plaintiff sent to its salesmen two stickers to be put "just above the opening so it can be readily seen by the operator of the scale," "wherever you find one of our barrel-shaped scales." The first sticker to be used on scales where an indicator records the weight in the centre of the chart is as follows: "To ascertain value, read figures adjacent to the price per lb when indicator is on even ounces; when indicator is on odd ounces or between even ounces take the mean of figures."

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The second sticker to be used where an indicating line is used in place of the indicator is: "For value, read figures when indicating line is directly over center. When indicating line is between center, take mean of figures."

This brings us to the contentions of the plaintiff and of the defendant as to the other use made of computing scales Nos. 63 and 61, namely, where a customer asks for so many cents' worth at a specified price and the scale is used to ascertain what weight should be given.

The alleged incorrectness of the chart when used in this way is also most easily shown by an example. Suppose four cents worth of cheese is asked for at seven cents a pound. In the seven cents a pound column there are two 4's, one opposite 8 ounces and the other opposite 10 ounces. A dealer naturally would or certainly might take the upper of these two four cents and deliver to his customer 8 ounces. The customer is entitled to $\frac{4}{7}$ of a pound, or a little more than nine ounces.

It is urged that the incorrectness of this chart when used in this way (to find the weight from the price) comes from the fact that values which are commercially but not arithmetically correct have no place upon such a chart. It is urged still further that they have no place on such a chart for these reasons: Where a customer buying by weight asks for an amount the price of which is not divisible by our currency, the fraction of a cent must be given to the customer or taken to himself by the dealer. But where the amount asked for by the customer is to be measured by its value and the dealer consents to sell on that basis, he is bound to give the customer the exact amount due him at that price if it can be weighed out to him.

In the case put above the customer is entitled to 9 ounces and $\frac{1}{7}$ of an ounce. It may be that there is a question as to how this $\frac{1}{7}$ of an ounce is to be dealt with in case of a scale which gives only ounces, for example. How such a fraction should be dealt with in such a case need not be determined here, it is urged. But what is clear as matter of law (it is also urged) is that the dealer in the case put above does not give the weight due to the customer when he gives the customer 8 in place of 9 ounces. The fraction to be disregarded here (if there be one) is the fraction of the ounce, not the fraction of a cent. And prices which

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are only commercially (not arithmetically) correct because calculated to give to one or the other those fractions of a cent which result from a sale by weight are not correct when used to sell by the money's worth and not by weight.

The first answer made to this by the plaintiff's counsel was that the chart was designed to give value for weight, and if to give weight for value it is used in a way for which the plaintiff is not responsible.

Here again it is a matter of common experience that in the "butcher and market trade" articles are bought and sold on the basis of so many cents' worth at a specified price. And there was evidence in the case at bar confirming this matter of common experience. In selling such an automatic self-computing scale under these circumstances the plaintiff must be taken to have intended it to be used not only to show the price of a specified weight but the weight at a specified price.

More than that, in making this contention there was evidence that the plaintiff for a second time was not altogether frank. In a circular sent out by the plaintiff to dealers who had bought No. 61 scales, to be distributed by them among their customers, is found this statement: "The use of this machine renders it impossible for you to lose one cent on account of short weight or a mistake in calculation. For example: Should you call for twenty-five cents worth of an article, when that article is placed upon the machine it will show its exact value in money." An attempt was made at the trial to confine this circular to scales of another type. But there was evidence that at the head of this circular there was the representation of a scale which is in fact a cut of a No. 61 scale.

We come now to the argument that St. 1907, c. 535, is unconstitutional.

The first contention made by the plaintiff's counsel in this connection is that since by the construction of these scales (taking No. 68 as a type) the scale is not the arbiter of the price but only of the weight, the regulation of the computing part of such a scale is not within the police power of the State. His argument in support of that contention is, to quote his own words, "In ascertaining the value of a given weight at a certain price per pound, there is no common arbiter in the control of

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either party to which both parties appeal. The sole arbiter is the multiplication table whose dictates are changeless. But the mental process of computation of either purchaser or dealer, the other party to the transaction does not accept. He makes it for himself. Hence any instrument making a computation for the dealer does not enter into the transaction; just as the dealer's table of values would not enter into a sale, so the computed values on the chart of the computing scale do not enter into the transaction over the computing scale. The law has no more right to interfere with the chart of computed values in the scale than it would have to interfere with the table of computed values kept by a merchant."

We have no doubt that it would be within the police power of a State to forbid the sale of incorrect tables of value to be used by dealers as correct tables in making sales of articles dealt in by them over an ordinary pound and ounce scale. In saying this we mean to put the case where the table is to be hung up on the dealer's wall and is not to be seen by the customer. By such a table of values not only would an honest dealer be tricked into making dishonest charges, but at least many customers would be cheated. For it is a matter of common experience that many customers accept the computation made by the dealer without verifying its correctness.

We are also of opinion that it is equally within the police power of the State to forbid the sale of such a table when it is made part of an automatic self-computing scale.

Had the Legislature enacted a law forbidding the sale of self-computing scales like the plaintiff's scale No. 63, it would (in our opinion) have been within the police power of the General Court. But that is not what the Legislature did in enacting St. 1907, c. 535.

More than that, in St. 1907, c. 535, the Legislature did not enact a statute where authority is given to an administrative officer to forbid the sale of a thing which can be regulated under the police power of the Legislature, in case he deems it to be contrary to law, until the court can determine the legal questions involved, as was the case in *New York Ins. Co.* v. *Hardison*, *ante*, 190. The act here in question (St. 1907, c. 535) makes the decision of each one of the three hundred and fifty-four

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sealers of weights and measures of the Commonwealth final upon the correctness of "computing scales and other devices having a device for indicating or registering the price as well as the weight of the commodity offered for sale." The statute provides that: "All such computing devices shall be tested as to the correctness of both weights and values indicated by them."

If the correctness of the values indicated by such scales and other devices is to be tested by arithmetic, that is to say, if the values are to be arithmetically correct, the acts of the several sealers of weights and measures are of the same character as their acts in determining the correctness of an ordinary pound and ounce scale and the statute is constitutional. The act of a sealer of weights and measures in determining whether a scale balances when nothing is on it and whether it indicates accurately the standard weights when they are placed upon it is an act ministerial in its character. All that the officer is called upon to do in performing this act is to be correct in his observation. Such an act not only may be but must be left to an executive officer. The determination of the correctness of a table of weights and values which is required to be arithmetically correct is of the same character.

But if the correctness to be finally passed upon by a sealer of weights and measures under St. 1907, c. 535, is the commercial correctness of the values indicated by such scales or other devices as the correct value for a given weight, that is to say, the sum legally due for a certain weight, and conversely, when articles are sold by the cent's worth, the weight legally due for the value specified, we are of opinion that the act would be unconstitutional. Such an act would leave to the final determination of a sealer of weights and measures the questions discussed in the arguments made at the bar as to the correctness of the computing scales under consideration here. That is to say, it would leave to an executive officer (first) the determination of the question how great a departure from mathematical accuracy would be permissible in determining the values of small articles sold by weight involving fractions of a cent without making the transactions commercially and therefore legally incorrect, and (second) the question whether a table of values

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which are only commercially correct because they disregard fractions of a cent is the proper basis for a table to be used to find the true weight of articles sold by the cent's worth. Those questions are judicial questions and cannot be left to the final determination of an executive officer.

In addition we are of opinion that the Legislature did not intend to leave to the final determination of three hundred and fifty-four municipal officers the final determination for the territory covered by their several municipalities the puzzling questions upon which the commercial correctness of these computing scales depends. It is enough to point out in that connection that different results might be expected to be reached in this question by such officers.

For these reasons we are of opinion that the General Court when it enacted St. 1907, c. 585, by which the correctness of self-computing scales and the other devices therein mentioned was committed to the final decision of the sealers of weights and measures for the several cities and towns of the Commonwealth, must (in our opinion) have intended that the values to be placed on such charts should be arithmetically correct. So construed, St. 1907, c. 585, is a valid statute, and the decree dismissing the bill must be affirmed.

So ordered.

J. M. Zane (of Illinois), (*W. H. Coolidge & C. F. Morse* with him,) for the plaintiff.

G. A. A. Pevey, (*A. H. Meads* of Illinois & *S. J. Elder* with him,) for the defendant.

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FRANK J. KIMBALL *vs.* ALFRED S. HAYES & others.

Suffolk. September 8, 1908, — October 19, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Agency. Broker.

The general rule that in the absence of a special agreement a principal by employing a broker to secure a customer for him does not deprive himself of the right to get a customer personally or through another broker, which has been applied in cases where a real estate broker was employed, applies equally where a note broker is employed to place a loan.

In a suit in equity to establish, and have paid from equitable assets, an alleged debt of the defendants to the plaintiff of $50,000 for services in procuring for the defendants a loan of $500,000 under an agreement in writing, or to recover the sum of $50,000 as damages for preventing the plaintiff from obtaining the loan by breaking the contract in taking a loan from another person, it appeared that the defendants desired the loan for the purpose of buying the stock of a certain steamship company, that in order to be of any benefit to the defendants for that purpose the loan would have to be placed before June 1 of the year then current and that this was known to the plaintiff, that on May 2 the agreement in writing was made between the plaintiff and the defendants, which stated that the defendants had "retained" the plaintiff (who was a member of the bar of New York) "to negotiate for them the obtaining of the aforesaid sum of $500,000, and hereby agree to pay to him as and for his services therefor the sum of $50,000, out of the proceeds of said $500,000, but not otherwise, and the . . . [plaintiff] agrees to accept the same in payment therefor." In anticipation of this contract, the plaintiff in March had opened negotiations with a certain trust company for a loan of $500,000 to the defendants. After the making of the contract, he continued his efforts to procure the loan from the trust company, with the result that the matter was to be reported upon at a meeting of the executive committee of the trust company to be held on May 29. On or before that day the defendants accepted another offer of a loan of $325,000. Before one o'clock on May 29 one of the defendants, acting for all of them, asked the plaintiff by telephone whether he had received any word from the trust company. To this the plaintiff answered that he had not, that the matter was to come up at four o'clock on that afternoon. The defendant, acting for all the defendants, then replied that he had decided to accept another offer. The contract contained no express provision that the employment of the plaintiff to procure the loan was to be exclusive. *Held*, that the plaintiff was employed as a broker and that there was nothing to take the contract out of the general rule that in the absence of a special agreement a principal by employing a broker does not deprive himself of the right to get a customer personally or through another broker; and that, even if the general rule were that as a matter of implication a broker has a reasonable time in which his right to find a customer is exclusive of other brokers and of his principal, a provision that the plaintiff was to have such an exclusive

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right until and including May 29 could not have been implied in the present case; therefore, that the defendants in obtaining the necessary money elsewhere violated no duty which they owed to the plaintiff, and that the bill must be dismissed.

BILL IN EQUITY, filed in the Supreme Judicial Court on September 29, 1903, under R. L. c. 159, § 8, cl. 7, to establish, and have paid from equitable assets, an alleged debt of the defendants to the plaintiff of $50,000 for services in procuring a loan of $500,000 under an agreement in writing, which is quoted in full in the opinion, or to recover the sum of $50,000 as damages for preventing the plaintiff from obtaining the loan by breaking the contract in taking a loan from another source.

On December 14, 1903, the case was heard by *Braley*, J., who made certain findings of fact, some of which are quoted in the opinion. On January 20, 1904, he made an interlocutory decree sending the case to a master, from which both the plaintiff and the defendants appealed.

On April 25, 1905, there was an order of reference to a special master to find the facts as to the damages sustained by the plaintiff by reason of the breach of contract set forth in the bill, and to ascertain the amount of such damages. The special master filed a report to which the parties filed exceptions. Decrees were made overruling the exceptions of the plaintiff and those of the defendants and confirming the master's report.

On January 20, 1908, the case came on to be heard by *Sheldon*, J., upon the application of the plaintiff for a final decree. The justice, after hearing the parties, reserved the case for determination by the full court, such final decree to be entered as should be in accordance with the law.

The case was submitted on briefs.

C. W. Bartlett & E. R. Anderson, for the plaintiff.

A. S. Hayes & W. S. Bangs, for the defendants Hayes and Gale.

LORING, J. Before May 2, 1903, the defendants Hayes, Gale, Daggett and Pye (who for convenience may be spoken of as the defendants) had joined together for the purpose of buying the stock of the Canada Atlantic and Plant Steamship Company, Limited, a foreign corporation owning a steamboat running apparently between Boston, Nova Scotia and Cape Breton.

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To pay for the stock (if they were successful in their negotiations for its purchase) they had to borrow a large sum of money, and on May 2, 1903, they made a written contract with the plaintiff (which is the foundation of this suit) in the following words:

"Whereas: Alfred S. Hayes, of Boston, Massachusetts and his associates are desirous of purchasing the charter, goodwill franchises, leases, the Steamship Halifax, now plying between Boston, Massachusetts and Halifax, Nova Scotia, and all the personal and real estate appertaining to the business now carried on and prosecuted by the Canada Atlantic and Plant Steamship Co. Limited; incorporated under the laws of Canada and having a place of business at Boston, Massachusetts, aforesaid, Halifax, Nova Scotia; Charlottestown, Prince Edwards Island; Hawkerbury, Cape Breton or elsewhere; and desires to obtain the sum of $500,000 cash for the purchase and carrying on of the aforesaid business and property, the same to be secured by a bond issue of the aforesaid company.

"Now Therefore This Agreement Witnesseth that the aforesaid Hayes and his associates, of the first part, have hereby retained F. J. Kimball, of 116 Nassau Street, New York City, of the second part, to negotiate for them the obtaining of the aforesaid sum of $500,000, and hereby agree to pay to him as and for his services therefor the sum of $50,000, out of the proceeds of said $500,000, but not otherwise, and the said F. J. Kimball hereby agrees to accept the same in payment therefor.

"It is Also Further Agreed by the first parties hereto that the said sum of $50,000 shall be deducted from the first payment, made on account of the said $500,000 paid by any person or persons, corporation or corporations, to the said parties of the first part, by or through the efforts directly or indirectly of said F. J. Kimball, in the premises herein, and at the time said first payment shall be made.

"It is Also Further Agreed by the first parties hereto that an agreement bearing even date herewith, providing for and covering Underwriters fees on aforesaid loan of $500,000 is in addition to an[d] exclusive of the aforesaid sum of $50,000 hereinbefore mentioned and agreed upon.

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"The Said Alfred S. Hayes for himself and for his associates hereinbefore named specifically states and agrees that he has full power and authority for and in their behalf to enter into this agreement on their behalf.

"In Witness Whereof the parties hereto have hereunto set their hands and seals this second day of May, A. D. 1903."

It is alleged by the plaintiff in his bill that he was a member of the bar of the City and County of New York. That doubtless is the reason why it is stated in the contract that he was retained.

In anticipation of some contract being made with the defendants, the plaintiff in March had opened negotiations with a New Jersey Trust Company for the loan of half a million dollars to the defendants. After the formal contract here in question was made the plaintiff continued his efforts to procure the loan from the trust company. The matter of granting the loan came before the executive committee of the trust company on May 22, and was referred to one Kean to look into and report upon at an adjourned meeting of the committee, to be held on May 29.

The single justice made these findings: "Apparently being uncertain as to whether this loan would be successful or not, some time prior to May 29, the defendant Hayes, acting for himself and his associates, accepted another proposition for a loan of three hundred and twenty-five thousand dollars. . . . And I am satisfied that the last loan was placed by the defendants on or before May 29, 1903." On May 29 "he [Hayes] had an interview with the plaintiff by telephone." Hayes asked the plaintiff whether he had received any word from the trust company; to this the plaintiff answered that he had not, that the matter was to come up at four o'clock on that afternoon. Hayes then said that he had decided "to take Boston money." It appears from some things said at this interview which are not material here, that this talk over the telephone took place before one o'clock on Friday, May 29.

The plaintiff contends that in preventing him from obtaining the loan the defendants broke their contract with him and are liable to him for the damages suffered by his not being allowed to perform his contract.

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The defendants' contention is that the services to be rendered by the plaintiff were those of a broker and that there is nothing in the contract here in question to take the case out of the general rule that in the absence of a special agreement a broker's authority to obtain a customer for his principal can be revoked at any time before a customer has been obtained, and that in such a case the principal is at liberty to complete a trade for the thing the broker was employed to get through another broker, or directly with a customer without the intervention of any broker.

The general rule that in the absence of a special agreement a principal by employing a broker to secure a customer for him does not deprive himself of the right to get a customer himself or through another broker, is settled. *Cadigan* v. *Crabtree*, 179 Mass. 474; *Cadigan* v. *Crabtree*, 186 Mass. 7, 12.

These cases are cases where the broker employed was a real estate broker. But the rule is the same in case of a note broker employed to place a loan, that is, to find a customer for the note of his principal, as it is in case of a real estate broker employed to sell the principal's real estate, that is, to find a customer to buy his principal's land. The fact that the plaintiff seems to be a member of the bar is of no consequence. He was employed to perform a broker's services and his rights depend upon the service he undertook. See *Miller* v. *Haskell*, 179 Mass. 312. To support this contention of the plaintiff it is incumbent on him to make out that by the written contract between the defendants and him, the defendants either made him their exclusive agent to place the loan in question, or — what is tantamount to that agreement — provided that he should have until and including May 29 to see whether he could procure it.

There is no express provision to that effect to be found in the contract. To succeed, therefore, the plaintiff must make out that such a provision is to be read into the contract by implication.

The only ground for implying such an agreement on the part of the defendants is the hardship to which the plaintiff is put if he is deprived of the fruit of his two to three months' work when he is apparently on the eve of success, as he was when the defendants revoked his authority on the morning of May 29 and

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took the loan offered them in Boston. That is looking at the matter from the plaintiff's point of view only, and is a hardship that every one incurs who undertakes to perform the services of a broker without a special agreement.

But the situation in the case at bar must be looked at from the point of view of the defendants as well as from that of the plaintiff. In the case at bar the single justice found "that the situation was such that, in order to be of any benefit to the defendants, such a loan would have to be placed on or before June 1, 1903, and that this was so understood by Kimball."

The situation then was this: On May 2 the defendants were conducting negotiations for the purchase of property, which, if successful, would make it necessary for them to borrow $450,000. Not only that, but to be of any benefit to the defendants they had to have the $450,000 actually in hand on the first day of June. And this was known to the plaintiff as well as to the defendants. It was under these circumstances that the defendants employed the plaintiff as a broker to place the loan. The plaintiff, by accepting that employment, came under an obligation to use his best endeavors to place the loan. But the obligation assumed by him went no further. He did not guarantee that he would be successful. He did not agree that the money would be forthcoming on June 1, when, if ever, it was to be of any benefit to his principals. It would have been an act of incredible stupidity on the defendants' part if under these circumstances they had agreed that the plaintiff alone should have the right to place the loan up to and including May 29. That is to say, that they should not be at liberty to provide for the contingency of the plaintiff's failure and must stake their enterprise on the plaintiff's best endeavors being successful. For that is what it comes to. They could not honorably open negotiations with others for the loan without disclosing the plaintiff's employment; and if they disclosed his employment and stated that they should want the loan on June 1 if he failed on May 29, they could not hope that their proposition would be entertained. It is incredible that they should have entered into a contract with the plaintiff which left them but two days, or, if the day on which the money had to be paid by them is counted, three days, in which to raise $450,000. Had the general rule been that as matter of implica-

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tion a broker has a reasonable time in which his right to find a customer is exclusive of other brokers and of his principal, a provision that the plaintiff in the case at bar was to have such an exclusive right until and including May 29 could not have been implied in the contract now under consideration.

It follows that the defendants in obtaining the necessary money elsewhere violated no duty which they owed to the plaintiff; and the entry must be

Bill dismissed.

MARY HINES *vs.* STANLEY G. I. ELECTRIC MANUFACTURING COMPANY.

MARY HINES, administratrix, *vs.* SAME.

Berkshire. September 8, 1908. — October 19, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Negligence, Employer's liability. *Statute*. *Practice, Civil*, Discretion of judge, Exceptions.

In actions by the administratrix and the widow of one who had been employed by the defendant, a manufacturing corporation, in which recovery was sought for conscious suffering and death of such employee, the declaration alleged that the accident was due to the employee's having been run over by a switching engine owned and operated by the defendant in its factory yard, and contained counts alleging in substance that the injury was caused by a defect in the ways, works and machinery of the defendant, by negligence on the part of the superintendent, by negligence of the defendant in failing to give the employee suitable warning and instructions and in failing to employ a sufficient number of workmen to operate the railroad tracks, switches and appliances, and also a count under R. L. c. 106, § 71, cl. 8, alleging that the accident was due to the negligence of a person employed by the defendant who was in charge of a locomotive engine and train in its yard. At the trial, the plaintiff's evidence tended to show that there were various tracks in the yard in question, but no turn tables and no "Y," that the engine which ran over the plaintiff's intestate was owned by the defendant and operated by a person in its employ, that it was customary, whenever the engine was moved, to ring its bell, and that the engineer had been instructed to ring the bell when passing over a crossing; that the plaintiff's intestate was the caretaker of the yard, and it was his duty to gather up rubbish and keep the drains open "all over the yard," that, just before he was run over, he was engaged in clearing out a culvert which was behind the engine as it stood still, partly on a crossing, and that he was bending over, astride of one of the railroad rails, with his back to the engine, that the engine started without the bell being rung and without any warning to the plaintiff's intestate, and he was run over. The presiding judge, at the close of the plaintiff's

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evidence, directed a verdict for the defendant; and the plaintiff excepted. *Held*, that the exception should be sustained, since there was evidence from which the jury would have been warranted in finding that the plaintiff was in the exercise of due care, and since, although there was no evidence which would warrant submitting the case to the jury on the other counts, there was evidence warranting a finding that the plaintiff's intestate was run over and killed by reason of the negligence of a person in the defendant's employ who was in charge of a locomotive engine or train upon a railroad.

Under R. L. c. 106, § 71, cl. 3, a manufacturing corporation, which owns and operates as its private property in its factory yard switching tracks and an engine, is liable for personal injury caused to one of its employees and due to negligence on the part of a person in its employ who is in charge or control of such engine upon such tracks.

It seems, that determination of the questions whether a plaintiff in an action of tort should or should not be ordered to furnish further particulars than those set out in his declaration, and whether, after he has furnished further particulars, he has furnished all that he should, is wholly within the discretion of the judge before whom the questions are raised, and his rulings thereon are not subject to exception.

TWO ACTIONS OF TORT, to recover for the conscious suffering and death of James Hines while in the employ of the defendant, caused by his being run over by a locomotive engine belonging to the defendant, which was attached to cars and was running upon a track in the defendant's factory yard. Writs in the Superior Court for the county of Berkshire dated January 17, 1907.

There was a trial before *Hitchcock*, J., who, at the close of the plaintiff's evidence, directed a verdict for the defendant; and the plaintiff excepted.

The facts are stated in the opinion.

J. F. Noxon, for the plaintiff.

C. H. Wright, for the defendant.

MORTON, J. These are actions of tort brought by the widow and administratrix respectively of one James Hines, — the first for his death and the second for his conscious suffering and death.

They were tried and argued together.

The deceased was in the employment of the defendant company and was run over and killed by a switch engine which was attached to some cars that were being moved by the defendant in its factory yard in Pittsfield. The engine was leased and operated by the defendant, — the engineer being hired and paid by it. The defendant's yard was fifty acres or more in extent and was bisected by the main line of the Boston and Albany

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Railroad, from which three side tracks ran into the yard, two on the northerly and one on the southerly side of the railroad. After these side tracks entered the yard, they branched out in many different directions to serve the various buildings. There were no Y's or turntables in the yard, and the engine could only move forwards or backwards as it was headed when it entered the yard. The deceased was caretaker of the yard and it was his duty to gather up any rubbish that might be scattered around and to keep the drains open. His work was "all over the yard" and he had charge of all of the tracks. It is nowhere particularly so stated in the bill of exceptions, but we infer that the tracks in the yard were built and maintained by and belonged to the defendant. At the time of the accident it was raining quite hard and had been for several hours. The engine and cars were standing, as there was evidence tending to show, partly on a crossing in the yard. The deceased went by them and stopped a short distance away and began to clean out with a long handled shovel a culvert which ran under the track. He stood stooping over astride of one of the rails with his back to the engine. While he was thus engaged, the engine backed down upon him and ran over and killed him. There was evidence tending to show that it was customary to ring the bell whenever the engine was moved in the yard and that the superintendent had instructed the engineer to ring the bell over crossings. There was also evidence tending to show that the bell was not rung at the time of the accident. At the close of the plaintiff's evidence the presiding judge, on the defendant's motion, directed the jury to return a verdict for the defendant in each case, and the plaintiff duly excepted to the ruling thus made. The cases are here on the exceptions thus taken, and on exceptions to the exclusion of certain evidence.

The actions are brought under the employers' liability act so called. R. L. c. 106, §§ 71, *et seq.* There are counts in the declaration in each case alleging in substance that the accident was due to a defect in the ways, works and machinery, to negligence on the part of a superintendent, and to negligence on the part of a person employed by the defendant to operate a locomotive and train upon a railroad track in its yard. The declaration in the action brought by the administratrix contains additional

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counts alleging that the accident was due to negligence on the part of the defendant in failing to employ a sufficient number of workmen to operate its railroad tracks, switches and appliances so as to enable the other employees to do their work in safety, and in failing to give the deceased suitable warning and instructions.

A general verdict having been ordered for the defendant in each case, it follows that, if in any aspect of the cases under any count there was evidence warranting a verdict for the plaintiff, the exceptions must be sustained. As the cases were left, waiving for the moment the question of the plaintiff's due care, we see no evidence authorizing a finding that the accident was due to a defect in the ways, works or machinery, or to negligence on the part of a superintendent, or to the failure of the defendant to employ a sufficient number of workmen to operate the railroad tracks, switches and appliances, or to failure on its part to give the deceased suitable warning and instructions. The cases must stand, if at all, on the ground that there was evidence warranting a finding that the deceased was in the exercise of due care, that the accident was due to negligence on the part of the engineer of the switch engine and that the defendant is liable therefor.

The defendant contends that the deceased was not in the exercise of due care. The argument is that, for the deceased to place himself upon the track back to the engine a short distance from it and then proceed to clean out the culvert without apparently taking any precautions for his safety, when he must have known that the engine might at any moment move towards him along the track where he was working, was of itself negligence on his part. And if that were all we should have to agree with the defendant that the deceased was not in the exercise of due care. But that is not all. There was evidence tending to show that it was customary to ring the bell whenever the engine was moved and that the engineer had been instructed by the superintendent to ring the bell when passing over a crossing. Whether the deceased knew of this instruction does not appear. But if the jury found, as they fairly might, that it was customary to ring the bell whenever the engine was moved, and that it was rung to warn others who were working in and around the yard

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so that they might take due precautions for their safety, and that the deceased knew of and relied upon this custom, then it could not be ruled as matter of law that he was not in the exercise of due care, but it would be a question for the jury whether in the exercise of due care he was justified in relying upon such warning, or whether he should have taken other precautions for his safety. *Ahearn* v. *Boston Elevated Railway*, 194 Mass. 350. *Morena* v. *Winston*, 194 Mass. 378. *Meadowcroft* v. *New York, New Haven, & Hartford Railroad*, 193 Mass. 249. *Carroll* v. *New York, New Haven, & Hartford Railroad*, 182 Mass. 237. *Rafferty* v. *Nawn*, 182 Mass. 503. *Davis* v. *New York, New Haven, & Hartford Railroad*, 159 Mass. 532. *Steffe* v. *Old Colony Railroad*, 156 Mass. 262. *Goodfellow* v. *Boston, Hartford & Erie Railroad*, 106 Mass. 461. It is possible that there may be cases in which the workman would be bound to take other precautions for his safety; but we do not think that this is one of them.

It is plain, we think, that there was evidence of negligence on the part of the engineer and that the defendant is liable therefor. There was testimony which, if believed, tended to show that he did not ring the bell, and that he either did not look to see if there was any one on the track, or that if he did look he looked carelessly. The engine and cars constituted a locomotive and train on a railroad within the meaning of R. L. c. 106, § 71, cl. 8, and, they being in charge of an engineer employed by the defendant, the defendant is liable for the engineer's negligence. There is nothing in the statute limiting it to railroad corporations, though the Legislature had them principally in mind, no doubt, in enacting the clause in question. The dangers to be guarded against in a case like that before us, while not so great as those arising in the freight yard of a railroad corporation, differ from them only in degree, and furnish no ground for construing the statute so as not to cover them. Moreover the case of *Coughlan* v. *Cambridge*, 166 Mass. 268, would seem to be decisive of this on this point.

As there must be a new trial and the questions of evidence now presented may not arise again, or, if they do arise, may come up in a different form, we do not deem it necessary to consider them, though we may observe, in passing, that we do

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not at present see why the testimony of the physician was not admissible.*

The defendant contends that, by reason of the insufficiency of the particulars that were ordered to be given, the plaintiff should have been nonsuited as to all the counts in both actions "except the single count filed in each action in amendment." But that question is not before us. It does not appear that the defendant excepted to the refusal of the court to order a nonsuit, and the only exceptions before us are the plaintiff's exceptions. Moreover, the question whether additional particulars should or should not be ordered, and whether those that had been furnished were or were not all that the plaintiff could reasonably be required to furnish, would seem to be a matter wholly in the discretion of the court and not subject to exception. *Harrington* v. *Harrington*, 107 Mass. 329. *Commonwealth* v. *Wood*, 4 Gray, 11.

Exceptions sustained.

INHABITANTS OF GREAT BARRINGTON *vs.* MARTIN GIBBONS.

Berkshire. September 8, 1908. — October 19, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Municipal Corporations, Officers and agents. *Overseers of the Poor*. *Statute*, Construction. *Words*, "Prosecute," "Preceding sections."

The word "prosecute," as used in R. L. c. 81, § 38, directing that in certain actions and prosecutions "the overseers of the poor of any place . . . shall appear and prosecute . . . in behalf of such place," includes the bringing as well as the carrying on of such an action.

Where it does not otherwise appear that any change in the law was intended in the revision of a statute, mere verbal changes made in such revision do not alter the meaning of the statute.

The overseers of the poor of a town were given power, under St. 1793, c. 59, § 14, to

* The physician, the associate medical examiner of Pittsfield, had testified that he had viewed the body of the plaintiff's intestate on the day of the accident, and he described in detail what he had observed at that time. The plaintiff then offered to show by him that, in the witness's opinion, the plaintiff's intestate consciously suffered between the times of his injury and of his death. The evidence was excluded, and the plaintiff excepted.

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prosecute in the name of the town certain actions described "in the preceding sections of this chapter." Like phraseology was used in the codifications of the law in Rev. Sts. c. 46, § 26, and Gen. Sts. c. 70, § 22, but in the revisions in Pub. Sts. c. 84, § 33, and R. L. c. 81, § 38, the words "of this chapter" were omitted, and among the "preceding sections" was Pub. Sts. c. 84, § 25, R. L. c. 81, § 29, providing for criminal prosecutions against the overseers themselves. *Held*, that it did not appear that by the last two revisions any lessening of the powers of the overseers to bring the actions specified in the chapters named was intended by the Legislature.

Under R. L. c. 81, § 38, the overseers of the poor of a town have power to bring in behalf of the town a bill in equity under § 11 of that chapter to compel a grandfather who has sufficient ability to contribute toward the support of his grandchildren who are paupers and are being supported by the town.

BILL IN EQUITY, filed in the Superior Court for the county of Berkshire November 16, 1907, under R. L. c. 81, § 11, seeking to compel the defendant to contribute toward the reimbursement of the plaintiff for support already furnished by it to the defendant's grandchildren, and to contribute toward their future support.

The petition was signed "Inhabitants of the Town of Great Barrington, by Edward E. Barnes, Dennis C. Killeen, Malcolm Douglas, Overseers of the Poor of the town of Great Barrington."

There was a hearing before *Hitchcock*, J., merely upon the sufficiency of one paragraph of the defendant's answer, which was to the effect that the action was not brought by the town or "by any duly authorized and qualified agent of" the town. The facts were agreed to and are stated in the opinion.

The judge made an interlocutory decree that the case should stand for trial, from which the defendant appealed. By agreement of parties, the case, being deemed by the judge of sufficient importance, was reported for determination by this court.

H. M. Whiting, (*H. C. Joyner* with him,) for the defendant.

E. C. Collins, for the plaintiff.

SHELDON, J. This bill is brought in the name of the plaintiff town under R. L. c. 81, § 11, to compel the defendant to contribute to the support of his grandchildren. The town, by vote under R. L. c. 25, § 12, had appointed its selectmen its agents to sue in its name. This suit was brought by the overseers of the poor of the town, without any authority from the selectmen or otherwise, except what may have arisen from their office as

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overseers of the poor; and the question is whether the action was rightly brought.

The general rule is that an officer of a town cannot merely as such officer bring an action in the name of the town. *Walpole* v. *Gray*, 11 Allen, 149, 150, and cases cited. But it is provided by R. L. c. 81, § 38, that "in all actions and prosecutions founded on the provisions of the preceding sections, the overseers of the poor of any place . . . shall appear and prosecute or defend the same in behalf of such place." To "prosecute" an action includes the bringing as well as the carrying on of the action. This is the ordinary meaning of the word. *Clinton* v. *Heagney*, 175 Mass. 134. And see the cases collected in 23 Am. & Eng. Encyc. of Law (2d ed.) 268. And the words "preceding sections," taken literally, include the section of the same chapter under which this bill was brought.

But the defendant contends that the words "preceding sections" should be limited to the three sections which immediately precede § 38. The authority in question was given to the overseers of the poor by St. 1793, c. 59, § 14, and has existed since that time. It was successively codified into Rev. Sts. c. 46, § 26, and Gen. Sts. c. 70, § 22. In all these statutes, the authority of the overseers of the poor was in terms extended either to actions and prosecutions under all the provisions or under the preceding provisions of the respective chapters. This would include in each case actions like the one before us. But the language was changed in Pub. Sts. c. 84, § 33, by omitting the words "of this chapter," so that the statute was cast in its present form. The defendants contend that this change in the phraseology of the statute indicated an intention of the Legislature to change the law and to restrict the authority given by R. L. c. 81, § 38, to the overseers of the poor, to actions and prosecutions brought under §§ 35, 36 and 37. But it does not appear that any change in the law was intended in the revisions either of 1882 or 1902; and the general rule is well settled that mere verbal changes in the revision of a statute do not alter its meaning. *Savage* v. *Shaw*, 195 Mass. 571, and cases cited. *Tilton* v. *Tilton*, 196 Mass. 562, 564, and cases cited. A striking example of the application of this rule may be found in *Electric Welding Co.* v. *Prince*, 195 Mass. 242, 259, *et seq.* This general

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rule cannot be overcome by the fact that in the two latest revisions there has been included among the "preceding sections" a provision (Pub. Sts. c. 84, § 25; R. L. c. 81, § 29) under which a criminal prosecution might be brought against the overseers of the poor themselves, and that they would not be held to be authorized either to prosecute or to defend such a prosecution in behalf of the town.

Accordingly, under the terms of the report, the case is to stand for trial.

So ordered.

JAMES M. BRYANT *vs.* CITY OF PITTSFIELD.

Berkshire. September 8, 1908. — October 19, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Statute, Acceptance. *Pittsfield. Eminent Domain. Damages*, For property taken or injured under statutory authority. *Water Supply. Watercourse.*

St. 1892, c. 185, by which an additional water supply for the city of Pittsfield was authorized, provided that it should not take effect "until accepted by a two-thirds vote of all the members of each branch of the city council of said city, taken by yeas and nays and approved by its mayor." In an action, in which it was material to show that this statute was accepted by the city, the records of the board of aldermen and of the common council showed that the statute was "adopted . . . by a two-thirds aye vote." *Held*, that the language of such a record of a legislative body is to be construed favorably to the validity of the action if it is fairly susceptible of such a construction, and accordingly that, although the records here were not so explicit as they ought to have been, they would be interpreted to mean that the act was accepted in accordance with its terms.

It is within the power of the Legislature to authorize a taking of property under the right of eminent domain without the use of any writing by an act *in pais* which purports to be done under the authority of the statute and which clearly indicates an intention permanently to appropriate the designated property to a public use.

Under St. 1892, c. 185, authorizing an additional water supply for the city of Pittsfield, which is silent as to the manner of taking the waters named, and contains no requirement in terms that any certificate or other writing should be filed in the registry of deeds, and, after making provision for taking the waters of certain brooks for a water supply, authorizes the city "for this purpose to take, by purchase or otherwise, any lands on or around any of said brooks, and any water and water rights connected therewith," the taking by the city of a deed of land on one of the brooks named in the statute, with the right to lay a pipe and construct an aqueduct, the erection of a dam across the brook and the construction

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of a reservoir there, the diversion of the water of the brook into a ten inch main and conducting it for use by the inhabitants of the city, all these things being done professedly under the authority of the statute, constitute a taking of the water of the brook within the meaning of the statute.

In an action of tort against a city for an alleged unlawful diversion of the water of a brook, the plaintiff cannot recover the compensation to which he is entitled under a statute authorizing the defendant to take the water of the brook for a water supply.

TORT for the alleged unlawful diversion of the water of Hathaway Brook which before such diversion flowed through the land of the plaintiff at Dalton. Writ dated December 29, 1906.

The defendant's answer, in addition to a general denial and setting up the statute of limitations, alleged that the acts complained of by the plaintiff were done by the defendant under the authority conferred upon it by St. 1892, c. 185.

In the Superior Court the case was tried before *Hitchcock*, J. The material facts shown by the evidence sufficiently appear in the opinion. The plaintiff asked the judge to make certain rulings among which were the following:

"7. There has been no legal taking of the waters of Hathaway Brook under the provisions of chapter 185, of the Acts of 1892, and the defendant is liable in this action for all damages which the plaintiff has suffered either by the taking of the waters of said brook or for injury to his premises from the operation of the dam constructed by the defendant.

"8. The defendant has never legally accepted said chapter 185, and all acts done by the defendant under the provisions of said chapter are illegal and void."

The judge refused to make these rulings. He ruled that the plaintiff could not recover on his first count which alleged the diversion of the water of the brook, and could not recover for the taking of the water of the brook. He submitted the case to the jury on the second and third counts which contained allegations of injuries to the plaintiff's land from the wrongful discharge upon it of waters from the defendant's reservoir. The jury returned a general verdict for the defendant; and the plaintiff alleged exceptions.

H. C. Joyner, for the plaintiff.

M. B. Warner, for the defendant.

KNOWLTON, C. J. The principal questions argued in this

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case are whether the St. 1892, c. 185, was duly accepted by the city of Pittsfield, and whether the act authorized the city, through its board of public works, to take the water of the brook without some formal proceeding in writing, by vote or otherwise, to show the acquisition of a title to the water.

The records of the board of aldermen and of the common council are substantially alike in regard to the action upon the statute, and both show that it was "adopted . . . by a two-thirds aye vote." While these records are not so explicit as they ought to be, their meaning seems to be that the act was adopted according to its terms. To give it effect, it was necessary to adopt it by a two thirds vote of all the members of each branch of the city council, voting by yeas and nays. A reasonable presumption is to be made in favor of the action of a legislative body. The language of a record is to be construed favorably to the validity of the action, if it is fairly susceptible of such a construction. *Wells* v. *Battelle*, 11 Mass. 477, 481. *Briggs* v. *Murdock*, 13 Pick. 305, 316. *Wallace* v. *First Parish of Townsend*, 109 Mass. 263. The present case is very similar to *McCormick* v. *Bay City*, 23 Mich. 457, in which the record was held sufficient.

A question of more difficulty is whether the statute can be construed as authorizing a taking of the water of the brook without something in writing which purports to work a change of title to the water. We have no doubt of the power of the Legislature to authorize a taking of property under the right of eminent domain without the use of any writing, by an act *in pais* which purports to be done under the authority of the statute, and which clearly indicates an intention permanently to appropriate the designated property to a public use. Of course, to give validity to a taking, there must be a provision for compensation to the owner, after sufficient notice, formal or informal, and an opportunity of being heard. See *Appleton* v. *Newton*, 178 Mass. 276. The statute before us is silent as to the manner of taking the waters, and there is no requirement in terms that any certificate or other writing be filed in the registry of deeds. After the provision for taking the waters of the brook for a water supply, the city is authorized "for this purpose to take, by purchase or otherwise, any lands on or around

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any of said brooks, and any water and water rights connected therewith." This language seems to point more directly to a paper title by a formal vote, or by purchase or otherwise, than the language that precedes it. But this relates only to the lands on or around the brooks and any water or water rights connected therewith, while the waters of the brooks themselves are referred to earlier, with a general provision for taking them and conveying them "to, into and through the city of Pittsfield." Most statutes in this Commonwealth, and especially those of recent enactment, have been so framed that a title could not be acquired without something more than a mere taking by the physical act of diverting and appropriating the water. There are good reasons why a taking that changes the title should be witnessed by something in writing which may be found of record, either in the registry of deeds or upon the books of a corporation. It is only when the statute plainly permits a taking by a mere act *in pais*, and when the act is of such a kind as to show with reasonable definiteness what is taken, that a title can be acquired in this way, without a formal act of taking other than the physical appropriation of the property. The subject is discussed at length, with a review of the authorities, in the case of *Gloucester Water Supply Co.* v. *Gloucester*, 179 Mass. 365, in which it was held that the equivocal act of temporary public use of water for about a year, professedly under the authority of a statute, did not constitute a taking. So it was held in *Warren* v. *Spencer Water Co.* 148 Mass. 9, that the physical diversion and appropriation of the water under the authority of a statute did not constitute a valid taking. But in each of these cases the statute called for the filing of a description in the registry of deeds, showing what was taken. In *Brickett* v. *Haverhill Aqueduct Co.* 142 Mass. 394, it was held that there was a valid taking, although there was no formal vote to take, or other writing purporting to change the title. The case of *United States* v. *Lynah*, 188 U. S. 445, 468, 469, tends somewhat to support the contention of the defendant in the present case.

Under the present statute, we are of opinion that the taking of a deed of land on the brook, with the right to lay a pipe and construct an aqueduct, and the erection of a dam and the construction of a reservoir on the brook, and the diversion of the

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water of the brook into a ten inch main and conducting it for use by the inhabitants — all these things having been done professedly under the authority of the statute — constitute a taking of the water within the meaning of the act. There is no question that the plaintiff had seasonable notice of the taking and an opportunity of being heard upon the question of compensation. The statute contemplated such a taking that the plaintiff and others interested would have proper notice of it. *Appleton* v. *Newton*, 178 Mass. 276. The plaintiff testified that he agreed with the board of public works upon a sum to be paid him as damages. The judge rightly refused to rule that there had been no legal taking of the waters of the brook.

As this is an action of tort for an unlawful diversion of the water, the plaintiff cannot recover in it the compensation to which he was entitled under the statute.

Exceptions overruled.

WALTER T. HORN *vs.* DORCHESTER MUTUAL FIRE INSURANCE COMPANY.

SAME *vs.* MIDDLESEX MUTUAL FIRE INSURANCE COMPANY.

SAME *vs.* TRADERS AND MECHANICS MUTUAL FIRE INSURANCE COMPANY.

Berkshire. September 8, 1908. — October 19, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Agency. Insurance, Fire. *Contract*, Validity. *Lord's Day.*

If one takes out a policy of fire insurance in response to the solicitation of an insurance agent this in no way makes the insurance agent the agent of the insured in afterwards procuring the signature of the insured to an agreement in writing purporting to cancel the policy, especially when the agent is acting wholly in the interest of the insurer and against the interest of the assured.

A contract made in violation of law cannot be enforced by setting it up as a defense to a cause of action otherwise well grounded. The parties to such a contract are left by the law where their own acts have placed them.

Signing and delivering on the Lord's day an agreement dated on a secular day to cancel an insurance policy and receiving in exchange a check for the return premium is a penal offense under St. 1904, c. 460, § 2, and the agreement of cancellation procured by such illegal transaction is no defense to an action on the policy to which it relates.

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THREE ACTIONS OF CONTRACT, by the same plaintiff against three different insurance companies, on policies of insurance against fire covering a dwelling house, a horse barn and a cow barn of the plaintiff in the town of Adams. Writs dated August 26, 1907.

In the Superior Court the cases were tried together before *Hitchcock*, J. It appeared in evidence that one Crosier, an insurance agent having an office at Adams, wrote insurance for one Miller, an agent for the defendant companies, upon a commission basis; that the property mentioned above was insured through Miller and that a commission was paid by Miller to Crosier for obtaining such insurance, the insurance having been obtained from the plaintiff upon the solicitation of Crosier. A total loss of the dwelling house by fire occurred on April 3, 1907, and a total loss of the horse barn by fire occurred on April 6, 1907. For these losses, the defendants admitted that the plaintiff was entitled to recover; but they denied their liability for the loss of the cow barn, described in the policies, which also was destroyed totally by fire on April 16, 1907. On Sunday, April 14, 1907, after the first two losses, and two days before the third loss, Crosier, under instructions from Miller, called upon the plaintiff with the agreements of cancellation referred to in the opinion. He told the plaintiff that his policies had been cancelled, and asked the plaintiff to sign a receipt for the return premium which he then gave to him; whereupon the plaintiff signed the three cancellation agreements and received the sum of $18.48, that being the amount of the return premium on the policies. The plaintiff retained the policies, and after Crosier left the house read them over and found that he was entitled to ten days' notice before cancellation; and as soon thereafter as he was able he went to Adams and paid back the $18.48 to Crosier, who received it in the manner stated in the opinion.

At the close of the evidence the plaintiff asked the judge to make the following rulings:

1. That it was a question for the jury upon all the evidence in the case as to whether Crosier was acting for Miller, and thereby acting for the insurance companies, or whether he was acting for the plaintiff at first in obtaining the insurance and later in obtaining the cancellation agreement.

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2. That from the evidence should the jury find that Crosier was acting for Miller, and thus was the sub-agent of the insurance companies, and that the cancellation agreement set up by the defendants was signed by the plaintiff on Sunday, and that the consideration therefore passed from Crosier to the plaintiff on Sunday, then they should be instructed to find that the cancellation agreement was invalid and was no defense, and that the plaintiff was entitled to recover the full amount of insurance covered by the policies.

3. That from the whole evidence the plaintiff was entitled to recover the full amount of the insurance as set forth in the policies and as set forth in the plaintiff's declaration.

The judge refused to make any of these rulings, and instead ruled as follows:

"I think I shall have to rule that that release obtained on Sunday is a valid defense to a part of this action, and that there is not sufficient evidence of any fraud or misrepresentation with reference thereto which can avail this plaintiff, and if the plaintiff was ignorant of the provisions of the policies that was his own fault; he had the policies and could have ascertained what his rights were under them, and in such case as that it would require evidence of distinct acts of fraud or misrepresentation with the intention to deceive to overcome that or enable him to avail himself of the claim that he did this through ignorance of the conditions of the policies. I think I shall have to rule too, that under the statute Crosier was agent of the company for the purpose of receiving payment of premiums, but according to the evidence he is not agent of the company for any other purpose, and if I understand the defense that is offered in this case, the question whether he was agent of the plaintiff or the agent of the companies in obtaining the insurance is an immaterial question, so that I must confess I fail to see anything to submit to the jury. The court thinks the plaintiff in these cases is entitled to recover on the two items on the insurance on the house and on the horse barn. I do not think he is entitled to recover the insurance on the cow barn. I will so direct the jury."

The judge also further ruled and instructed the jury as follows:

"In the opinion of the court these cases have resolved them-

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selves into questions of law and that there are no questions of fact to be submitted to you. The ruling of the court is that the defendant in each of these cases is not liable on the policy for any loss that occurred after April 15, 1907. And in addition, the defendants are liable in these actions for the losses that occurred prior to that date and each is liable for the sum of $433.33 together with interest thereon from June 24, 1907, and it is agreed between counsel that the amount stated together with interest amounts in each case to $454.56. You are therefore directed to find a verdict for the plaintiff in each case for that amount."

The jury returned verdicts as directed; and the plaintiff alleged exceptions.

The case was submitted on briefs.

F. R. Shaw & H. L. Harrington, for the plaintiff.

J. F. Noxon & M. L. Eisner, for the defendants.

RUGG, J. The first question is whether Crosier was the agent of the plaintiff in what he did as to the cancellation of the policies. There was no general or previous agency, nor express authority from the plaintiff to him to cancel upon condition; hence *Faulkner* v. *Manchester Assurance Co.* 171 Mass. 849, is distinguishable. If the agency exists, it must be implied from these facts: The plaintiff was solicited to let the insurance policies in issue be written by Crosier; the plaintiff assented, and the amount to be placed was decided upon between the plaintiff and the representative of a bank, which was loaning the former money upon the security of a mortgage on the property insured, and to which as mortgagee the policies were made payable. Crosier did not write the insurance in any companies represented by himself, but obtained the policies from one Miller, who was the agent of the defendants, and from him received a commission; this occurred about January 15, 1906, when the policies were dated; later the plaintiff paid the mortgage, received the policies into his own possession, and retained them until after the fires about eight months later; the policies covered three buildings, one of which was burned on April 3, another on April 6, and the third on April 16, 1907; on Friday, April 12, 1907, after the first two fires, Miller wrote and dated the receipt of return premium and cancellation of each policy, and sent

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them to Crosier, together with a check for the return premium and dividend, requesting him to get them signed by the plaintiff; Crosier on Sunday, April 14, went to the home of the plaintiff, and said to him, in substance, "the companies have cancelled the policies; you will have to sign these notices; I will pay you the money"; the plaintiff, in ignorance of the provision of the policies, requiring a ten days' notice of the cancellation of the policies, signed the receipts and cancellations, and received payment partly in check and partly in money for the return premiums and dividends; a few days later the plaintiff, learning of the ten day cancellation term of the insurance contract, returned the money to Crosier, who did not want to receive it, but the plaintiff left it, and Crosier sought and received from the defendant's agent, Miller, instructions as to its disposition, which he followed.

It is plain, from this narration, that Crosier in respect of the cancellations was acting solely as the agent of the defendants. There was no general agency respecting fire insurance matters from the plaintiff to him. No such inference can be drawn from authority conferred as to a single insurance of property. The solicitation from and in behalf of Crosier was merely to write the particular insurance. All that the plaintiff did was to accede to this request. His act carried no power as to the policies after they were procured. See *Green* v. *Star Ins. Co.* 190 Mass. 586, 596.

The conduct of Crosier touching the cancellations shows that he was not acting as the representative of the plaintiff but of the defendants. He was instigated, not by the plaintiff, but by the authorized agent of the defendants. He was by this agent furnished in advance with the necessary money and documents, which, if properly executed, would guard their interests and deprive the plaintiff of all protection. It was wholly against the interest of the plaintiff to have the policies cancelled, and it was the obvious duty of Crosier, if acting as his agent and in his interest, to insist upon compliance with the term of the policy as to the ten days' notice, and not voluntarily to waive it. But he stated to the plaintiff the fact that the companies had cancelled the policies, without adding that, unless he signed the paper presented, the companies would be obliged to give him

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a written notice of the cancellations, and that any loss occurring within ten days after the notice would not be affected. He asked the plaintiff to sign the papers, and take the money. This is not the action of an agent of the insured, but of the other party to the contract. There is no circumstance upon which agency for the plaintiff can be predicated.

The procuring from the plaintiff of the receipts and agreements for cancellation of the policies having been the act of the defendants, it remains to inquire what is their effect as a defense. Although dated on a secular day, they were in fact signed and delivered by the plaintiff and the money paid to him by the agent of the defendants on the Lord's day. The doing of this business was a penal offense. St. 1904, c. 460, § 2. It has been often decided to be against the policy of the law for courts to lend their aid in the enforcement of contracts made in violation of this statute. This is equally true, whether the effort is to sue directly upon such a contract or to interpose it as a defense to an otherwise well grounded cause of action. Parties are left by the law precisely where their own acts, in making such a contract, leave them. Although performance on Sunday of a valid contract will not be treated as a nullity, it will not be given an independently affirmative effect beyond mere performance. *Gordon* v. *Levine*, 197 Mass. 263. *Clapp* v. *Hale*, 112 Mass. 368. Before the transaction on the Lord's day herein pleaded, there were valid contracts of insurance between the plaintiff and the defendants. What the defendants sought to set up as a defense was not performance of their contracts by the payment of previously established and liquidated liability, but new contracts by which the original contracts were annulled. It would be directly enforcing a contract made on the Lord's day to permit such a defense to prevail. The alleged cancellations of the policies were therefore void. *Moseley* v. *Hatch*, 108 Mass. 517. *Stevens* v. *Wood*, 127 Mass. 123.

Exceptions sustained.

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WINTHROP DELANO *vs.* CHARLES N. CLARK.

Hampshire. September 14, 1908. — October 19, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Probate Court, Appeal, Jurisdiction. *Conservator.*

On the hearing before a single justice of an appeal to this court from a decree of the Probate Court dismissing a petition to have a conservator, who previously had been appointed to take charge of the petitioner's property because of the petitioner's mental weakness, removed and the property restored to the petitioner, the appeal was dismissed, and the petitioner appealed to the full court. The petition alleged and the answer denied that the petitioner had become able to take care of his property. The record before the full court contained no report of the evidence and no statement of the reasons why the single justice dismissed the appeal. *Held*, that there was nothing in the record to show that the appeal was not dismissed properly.

A petition which sought the appointment of a conservator of the property of one, who was alleged to be mentally weak and unable properly to care for his property, purported to be brought by a mayor and the overseers of the poor and one citizen of the city where the respondent lived, but contained no allegation that any of the petitioners were friends of the respondent. After the petition was filed, the Probate Court allowed it to be amended by adding after the petitioners' names the words "all of them being friends" of the respondent, and, after a hearing, granted the petition. *Held*, that the Probate Court had jurisdiction to allow the amendment and afterwards to grant the petition.

PETITION, filed in the Probate Court for the county of Hampshire December 20, 1906, for the removal of a conservator of the petitioner's property, who previously had been appointed by that court because the petitioner, owing to mental weakness, had been unable properly to care for his property. The petition also sought to have the petitioner's property restored to him.

In the Probate Court *Bassett*, J., dismissed the petition. On appeal there was a hearing before *Knowlton*, C. J. The only mention in the record of the hearing before the Chief Justice is contained in the docket entries and is as follows: "Hearing" April 21, 1908, "and ordered that petition be dismissed." The petitioner appealed.

Other facts are stated in the opinion.

The case was submitted on briefs.

H. Lasker, for the petitioner.

J. B. O'Donnell, for the respondent.

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MORTON, J. This was a petition by the appellant for the discharge of a conservator who had been appointed over his estate. The petition was dismissed by the Probate Court and the petitioner appealed. The case came on to be heard before the Chief Justice, and after due hearing the petition was ordered to be dismissed by him, and the decree of the Probate Court affirmed. The petitioner appealed from this decree. No report of the evidence is before us, and the only question is, therefore, whether in any aspect of the case before him the Chief Justice could have rightly ordered the petition to be dismissed. And it is clear that he might properly have made such a disposition of the case. The ground of the petition was that the petitioner was able to care for his property himself. The answer denied this. In dismissing the petition the Chief Justice might have found that the petitioner was not able to take care of his property himself, or that he had not sustained the burden which rested upon him to show that he was able to take care of his property, and without a report of the evidence it is manifest that we cannot say that the action of the Chief Justice in dismissing the petition was wrong. See *Hodgdon* v. *Fuller*, 193 Mass. 331. *Codwise* v. *Livermore*, 194 Mass. 445.

Printed with the record in this case are copies of the papers relating to the proceedings upon the original petition for the appointment of a conservator. From them it appears that the petition as originally drawn was by the mayor and overseers of the poor of Northampton and one other citizen. Subsequently the petition was amended "by adding after the first recital of the names of the petitioners, the words, 'All of them being friends of Winthrop Delano of said Northampton,'" and the appointment was made upon the petition as thus amended. The petitioner seeks to raise in these proceedings a question of jurisdiction affecting the validity of the original appointment by the contention that upon the petition as originally drawn the Probate Court had no jurisdiction to appoint a conservator, that it had no power to allow the amendment which was allowed, and that, therefore, the original appointment was void. This is the only question which has been argued by the petitioner. If we assume in favor of the petitioner, but without so deciding, that the question of the validity of the original appointment could be and is properly raised

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in this case (as to which see *Jochumsen* v. *Suffolk Savings Bank*, 3 Allen, 87), and that the appointment would be void if made upon the petition as originally drawn, the answer to the petitioner's contention is that the appointment was not made upon the petition as originally drawn but upon the petition as amended, and that the Probate Court as an incident of the proceedings before it clearly had power to allow the amendment. As amended the petition was not a petition by the mayor and overseers of the poor but by the persons named as friends of the party to whom the petition related, and as such came within the purview of the statute and the jurisdiction of the court. R. L. c. 145, § 40.

It follows that the decree dismissing the petition must be affirmed.

So ordered.

COMMONWEALTH *vs.* ARTHUR KINGSBURY.

Franklin. September 15, 1908. — October 19, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Automobile. Constitutional Law.

The Legislature has the right, acting under the police power, to prescribe that automobiles shall not pass over certain streets or public ways in a city or town.

St. 1905, c. 366, § 1, as amended by St. 1906, c. 412, § 9, providing that boards of aldermen in cities and of selectmen in towns may make special regulations as to the speed of automobiles and as to their use "on particular roads or ways, including their complete exclusion therefrom," and providing also for publication of the regulations, and for an opportunity to be given for a protest against the action of such a board to the State highway commission by at least fifty residents of the Commonwealth, ten of whom must be taxpayers of the city or town affected, and providing that, in case of such protest, the regulations shall not be effective until a hearing thereon and a decision of the commission approving of the regulations, is not an improper delegation by the Legislature to the aldermen and selectmen of the power to make laws, but is a proper exercise of the police power by the Legislature, and therefore is constitutional, as also is St. 1907, c. 203, fixing a penalty for a violation of such a regulation.

COMPLAINT, received and sworn to before the District Court of Franklin on September 20, 1907, charging the defendant with operating an automobile on September 15, 1907, upon a highway

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from which automobiles were excluded by vote of the selectmen of the town of Ashfield under St. 1907, c. 203.

On appeal to the Superior Court, the case was tried before *Stevens*, J., upon an agreed statement of facts, from which it appeared that on the occasion in question the defendant was driving his automobile on a highway from which automobiles had been excluded by the selectmen, as alleged in the complaint, intending to go to the house of one William Howes, which was located on the highway in question; that the purpose of the defendant's trip was to carry a relative who was visiting him to the house of Howes in order that said relative might visit his sister, who was the wife of Howes; that there were three roads which the defendant could have taken which would have led him to the house of Howes, all three of which, or the parts of the same which lie in the town of Ashfield, were posted as provided by St. 1907, c. 203, excluding automobiles therefrom; that the defendant could not have reached the house of Howes without passing over some portion of a highway from which automobiles were excluded; that on the occasion in question the defendant operated his automobile over a distance of about one half mile of posted highway; that, had the defendant passed over either of the other two roads, he would have travelled over a distance of between two and three miles of highway in Ashfield so posted; that the highway which was so posted, over which the defendant did pass, was an ordinary country road, the travelled part of which is about twelve feet in width; that on the road was a public schoolhouse and several farm houses, one of which was the farm of Howes; that the automobile was the ordinary type of touring car; that it was licensed and that in all other respects the defendant had complied with the law relative to the use of automobiles.

The defendant was convicted, and alleged exceptions, as stated in the opinion.

C. N. Stoddard, for the defendant.

R. W. Irwin, District Attorney, for the Commonwealth.

KNOWLTON, C. J. The defendant was convicted of having operated an automobile in violation of law, over a highway legally laid out in the town of Ashfield, from which automobiles were excluded under the authority of the statutes. He took excep-

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tion to the refusal of the trial judge to make certain rulings requested, which, in a variety of forms, raised the question whether the St. of 1905, c. 366, § 1, as amended by the St. 1906, c. 412, § 9, and the St. 1907, c. 203, were constitutional. The first of these statutes authorizes boards of aldermen in cities and boards of selectmen in towns to "make special regulations as to the speed of automobiles and motor cycles, and as to the use of such vehicles on particular roads, including their complete exclusion therefrom." These regulations must be published in one or more newspapers and posted conspicuously on sign boards. On protest in writing within sixty days, made by not less than fifty residents of Massachusetts, at least ten of whom are taxpayers of the city or town, the Massachusetts highway commission, after notice and a hearing, may approve the regulations, and if there is such a protest the special regulations are of no validity without such approval. The St. 1907, c. 203, prescribes penalties for violation of the regulations. The contention of the defendant is that the Legislature had no constitutional right to enact such a law.

Automobiles are vehicles of great speed and power, whose appearance is frightful to most horses that are unaccustomed to them. The use of them introduces a new element of danger to ordinary travellers on the highways, as well as to those riding in the automobiles. In order to protect the public great care should be exercised in the use of them. Statutory regulation of their speed while running on the highways is reasonable and proper for the promotion of the safety of the public. It is the duty of the Legislature, in the exercise of the police power, to consider the risks that arise from the use of new inventions applying the forces of nature in previously unknown ways. The general principle is too familiar to need discussion. It has been applied to automobiles in different States with the approval of the courts. *Commonwealth* v. *Boyd*, 188 Mass. 79. *Christy* v. *Elliott*, 216 Ill. 31. *People* v. *Schneider*, 139 Mich. 673. *People* v. *MacWilliams*, 86 N. Y. Supp. 357.

It seems too plain for discussion that, with a view to the safety of the public, the Legislature may pass laws regulating the speed of such machines when running upon highways. The same principle is applicable to a determination by the Legislature that

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there are some streets and ways on which such machines should not be allowed at all. In some parts of the State, where there is but little travel, public necessity and convenience have required the construction of ways which are steep and narrow, over which it might be difficult to run an automobile, and where it would be very dangerous for the occupants if automobiles were used upon them. In such places it might be much more dangerous for travellers with horses and with vehicles of other kinds if automobiles were allowed there. No one has a right to use the streets and public places as he chooses, without regard to the safety of other persons who are rightly there. In choosing his vehicle, every one must consider whether it is of a kind which will put in peril those using the streets differently in a reasonable way. In parks and cemeteries and private grounds, where narrow roads with precipitous banks are sometimes constructed for carriages drawn by horses, it has been a common practice to exclude automobiles altogether, chiefly because of the danger of their frightening horses.

The general principle referred to was applied long ago to a different kind of vehicle, in *Commonwealth* v. *Stodder*, 2 Cush. 562, a case which relates to an ordinance of the city of Boston, prescribing the streets on which certain omnibuses might be run and excluding them from other streets. A part of the opinion is as follows: "We perceive nothing objectionable in an ordinance, by the mayor and aldermen, providing for the safety and convenience of the public generally, by prescribing, by a general by-law or ordinance, certain streets or portions of streets, to be used for travel by vehicles, exposing by their manner of use the lives and limbs of the public generally, who may have occasion to use the public streets, if such vehicles are permitted to use the public streets indiscriminately; and such regulations and restrictions might be warranted even to effect the minor object, that of preventing the greatly [sic] obstructing [of] the free and convenient use of the streets for general purposes, by interdicting carriages of unusual size or drawn by an unusual number of animals, or those of such character as would greatly interfere with the public convenience and safety. To take a strong case: Suppose the proprietor of the omnibuses from Roxbury should deem it expedient to propel his carriages by steam power, pass-

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ing through Washington Street, at a rapid rate, would it not be a lawful and proper regulation for the mayor and aldermen to prohibit the using of Washington Street by vehicles propelled by steam power? We cannot doubt that it would be."

The right of the Legislature, acting under the police power, to prescribe that automobiles shall not pass over certain streets or public ways in a city or town, seems to us well established both upon principle and authority.

It is contended that this power cannot be delegated to a board of aldermen or selectmen, or to the Massachusetts highway commission. The question involved in this contention was fully considered and was decided in *Brodbine* v. *Revere*, 182 Mass. 598. It also arose in *Commonwealth* v. *Crowninshield*, 187 Mass. 221. It was decided in favor of the Commonwealth's contention in *Nelson* v. *State Board of Health*, 186 Mass. 330, and was discussed and similarly decided in *Commonwealth* v. *Sisson*, 189 Mass. 247. In *Commonwealth* v. *Stodder*, *ubi supra*, and in *Commonwealth* v. *Mulhall*, 162 Mass. 496, the prohibition was by an ordinance passed by a local board. These cases make further discussion unnecessary.

Exceptions overruled.

MARSHALL ENGINE COMPANY *vs.* NEW MARSHALL ENGINE COMPANY & another.

Franklin. September 15, 1908. — October 19, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Equity Jurisdiction, To compel assignment of patent. *Jurisdiction. Patent.*

A master, to whom was referred a suit in equity against a corporation and an inventor to compel the corporation to assign to the plaintiff certain letters patent, and to enjoin the defendants from manufacturing or selling machines covered by such letters patent, found that the inventor formerly had owned letters patent covering a certain type of machine, and had applied for the letters patent, which were the subject of the suit, and which were upon an improvement on the original machine, that, after the original patent had expired and while the application for the patent upon the improvement was pending, he in writing assigned to the plaintiff all his "right title and interest" to the original patent, and "all further improvements thereon and renewals of the aforesaid patent," and the assignment

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duly was recorded in accordance with the national patent law. Thereafter the letters patent, which were the subject of this suit, were issued to the inventor, and he assigned them to the defendant corporation. The defendants moved to dismiss the bill on the ground of lack of jurisdiction in the State court, contending that, under U. S. Rev. Sts. § 711, cl. 5, the United States courts had exclusive jurisdiction, because the bill presented "a question involving an inquiry as to the construction and scope of the patents therein mentioned," namely, the question whether the later patent was for an "improvement" upon the machine formerly patented. The motion was denied and the defendants appealed. *Held*, that the motion was denied properly, since the suit related to the construction and enforcement of an instrument transferring rights under letters patent, and of such a suit the jurisdiction of the United States courts is not exclusive.

BILL IN EQUITY, filed in the Superior Court for the county of Franklin on October 23, 1905, seeking to compel the defendant corporation to assign to the plaintiff United States letters patent numbered 725,349, alleging that the defendant Frank J. Marshall had assigned to the plaintiff all his "right title and interest in and to" United States letters patent numbered 342,802, for an improvement in engines, "and all further improvements thereon and renewals of the aforesaid patent, that the letters patent numbered 725,349, which were granted to Marshall after the assignment to the plaintiff, but upon an application pending at the time of such assignment, were upon an improvement on the engine on which the letters patent 342,802 were granted, and that Marshall had assigned the letters patent numbered 725,349 to the defendant corporation; and seeking also that the defendants be enjoined from manufacturing or selling any engines covered by the last named patent.

The cause was referred to a master, who filed a report on February 18, 1907, to which the defendants filed objections but no exceptions. On April 6, 1907, *Fessenden*, J., ordered the master's report confirmed.

On April 18, 1907, the defendants filed a motion that the bill be dismissed on the ground that it presented "a question involving an inquiry as to the construction and scope of the patents therein mentioned, of which question the federal courts have exclusive jurisdiction." This motion was denied on April 25, 1907, and the defendants appealed.

A final decree granting the prayers of the bill was entered thereafter and the defendants appealed.

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F. J. Lawler, (*L. W. Griswold* with him,) for the defendants.

F. L. Greene, (*W. H. Bond* of New York with him,) for the plaintiff.

LORING, J. The only ground on which the defendants contend that the decree in favor of the plaintiff should be reversed is that the case at bar is a case arising under the patent right laws of the United States. If it is, this court has no jurisdiction. By U. S. Rev. Sts. § 711, cl. 5, the jurisdiction given to the courts of the United States in such cases is exclusive of the courts of the several States.

The cause was sent to a master. From his report it appears that in 1886 a patent was issued to the defendant Marshall for an improvement in pulp beating machines.

This patent expired on June 1, 1903. Between eight and nine months before the expiration of this patent, (on September 13, 1902,) Marshall organized the plaintiff corporation in New Jersey. It had a capital stock of $50,000, of which shares to the amount of $5,000 were preferred and $45,000 common. On September 15, 1902, all the common stock was issued to Marshall in consideration of an assignment by him of the "United States Letters Patent, No. 342,802, for improvement in engines issued to Frank J. Marshall June 1, 1886, and all improvements thereon and renewals of the same," and the good will of his business. This was not recorded in the patent office. At the date of this agreement Marshall "had pending an application for a patent on which application patent 725,849 was issued in 1903."

The assignment of September 15 contained a covenant of further assurance, and on October 8, 1904, (one year and four months after the original patent had expired,) Marshall, at the request of the plaintiff, executed and delivered to it an assignment in pursuance of this covenant of further assurance. After reciting that he had obtained "letters patent of the United States of America for an improvement in engines, which letters patent are numbered 342,802," and that he had made a former assignment of the patent, and the fact that the assignment was not recorded and that he previously had made a covenant of further assurance, Marshall assigned to the plaintiff "the whole right, title and interest in and to the said improvement in engines, and in and to the letters patent therefor aforesaid, and

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all further improvements thereon and renewals of the aforesaid patent."

Meanwhile, to wit, on April 14, 1903, Marshall had obtained another patent for an improvement in pulp beating engines. With respect to this improvement the master made this finding: "The machine described in the second patent is like that described in the first with the single exception that a portion of the machine called in the first patent a 'bed plate' is described in the second patent as made in two sections clamped together, instead of being in a single piece. This is the improvement for which the patent of 1903 (No. 725,849) was granted, it being claimed that the improvement facilitated the removal of the plate when necessary for cleaning the machine or for any other purpose. When the parts are clamped together, so that the machine is ready for use, the operation of the machine is precisely like that of the machine described in the patent of 1886 (No. 342,802)."

On June 15, 1905, a receiver was appointed for the plaintiff corporation in New Jersey, and later the same person was appointed receiver in ancillary proceedings begun in Massachusetts. On June 21, 1905, Marshall organized a Massachusetts corporation to operate the patent rights covered by the later patent, (No. 725,349,) and on June 22 assigned that patent to the new corporation. This new corporation is the other defendant in the suit now before us. The Massachusetts corporation has a capital stock of $50,000, all issued to Marshall except three shares, and Marshall is the president and treasurer of it.

In taking out the letters patent No. 725,849 for the improvement in pulp beating machines, Marshall stated that this was "an improvement on patent No. 411,251, granted September 17, 1889, to E. R. Marshall and also embodies features shown in patent No. 342,802, granted June 1, 1886, to myself." Beyond this statement in letters patent 725,349, it does not appear that a patent was issued to E. R. Marshall. It nowhere appears in the case what the improvement covered by that patent consists of nor who E. R. Marshall is.

The words "all improvements thereon" in the agreement of September 15, 1902, include all improvements on the improvement in engines for which the original letters patent were

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granted. On the finding of the master the improvement for which letters patent No. 725,849 were issued was an improvement in engines for which the original letters patent (No. 342,802) were granted and is covered by the agreement of September 15. This conclusion is enforced by the fact that, when this agreement was made, Marshall had pending an application for the improvement afterwards covered by letters patent 725,849.

The defendants contend that the question whether the improvement for which the later letters patent were issued is an improvement on the former improvement is a question arising under the patent right laws of the United States.

It is settled that "where a suit is brought on a contract of which a patent is the subject matter, either to enforce such contract or to annul it, the case arises on the contract, or out of the contract, and not under the patent right laws" of the United States. *Wade* v. *Lawder*, 165 U. S. 624, and cases cited. See also *Lamson* v. *Martin*, 159 Mass. 557.

Further it is settled that if the invalidity of a patent is incidentally drawn in question in a cause properly cognizable in a State court, the jurisdiction of that court is not thereby ousted. *Pratt* v. *Paris Gas Light & Coke Co.* 168 U. S. 255. See also in this connection *Jackson* v. *Allen*, 120 Mass. 64; *Burton* v. *Burton Stock Car Co.* 171 Mass. 437.

The principal argument of the defendants in support of their contention is founded on the clause in the final decree by which the defendants and both of them, together with "all persons acting or claiming under them or any of them" are "perpetually enjoined and restrained from engaging in the business of making, vending, filling, selling and otherwise dealing in and with, the devices and machines covered by Patent No. 725,349 of the United States of America, for a new and improved device in refining engines known as the 'Marshall Perfecting Engine.'"

This argument, put forward by the defendants in several forms, is that a suit for an infringement would have resulted in such an injunction as that contained in the final decree in the case at bar, and for that reason the suit now before us is a suit arising under the patent right laws of the United States.

In the case at bar the right of the plaintiff to an assignment

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of patent No. 725,849 was and is a right arising out of the contract between the plaintiff and Marshall, dated September 15, 1902. By force of that contract, under the facts which afterwards happened, the plaintiff was entitled to a decree directing both defendants to assign that patent to the plaintiff. As a corollary and as an incident to that relief it was perhaps not improper to enjoin these defendants from doing acts which the owner of that patent alone can do. However that may be, the decree in the suit now before us is not a decree that the defendants have done certain acts which it is now decided are a violation of the rights secured to the plaintiff by letters patent. It is a decree that, since the plaintiff is the owner of the patent here in question, the defendant cannot do those acts which the patent secures to the owner, without deciding what those acts are. In other words, the suit now before us is just what *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.* 185 U. S. 282 (relied on by the defendants) was not.

The defendants have also argued that, to decide in favor of the plaintiff, this court must determine a question of infringement between the patent 342,802 and patent 411,251.

The short answer to that contention is that no such case appears to have been raised in evidence before the master. It does not appear even what patent 411,251 consists in. In that state of the evidence there can be no question of infringement between 342,802 and 411,251. We do not intend to intimate that this objection would have been good if it had appeared that one of these two patents infringed upon the other.

*Decree affirmed.**

* The case was taken to the Supreme Court of the United States by writ of error.

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LOIS C. SIMONDS *vs.* LOTTIE J. SIMONDS & others.

Hampden. September 22, 1908. — October 19, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Deed, Construction. *Use. Shifting Use. Words*, "Remainder."

A deed made by one L. S. recited that it was in consideration of $1,000 paid by C. S., the son of the grantor, and remised, released and forever quitclaimed unto the said C. S. his heirs and assigns certain parcels of land with the buildings thereon. After the description the deed proceeded as follows: "Reserving to myself the right at any and all times to cut and remove from any and all said tracts so much of the wood and timber growing thereon as I shall from time to time see fit and retain the same to my own use. To have and to hold the aforegranted premises to the said C. S. during the term of his natural life remainder to such of the children of said C. S. as shall arrive at the age of twenty-one years their heirs and assigns, to their use and behoof forever. So that neither I the said L. S. nor my heirs, nor any person or persons claiming from or under me or in the name, right or stead of me or them by any way or means, have any estate, right title or interest of in and to the aforesaid premises with the appurtenances except as aforesaid." C. S. died leaving five children, of whom two were of age and three were minors. *Held*, that the deed did not create a contingent remainder in such children of C. S. as should arrive at the age of twenty-one years, but expressly declared the intention of the grantor to part with all his interest in the property except the reservation of the right to cut wood, and that the intention of the grantor would be carried into effect by treating the deed as a conveyance to uses, that the fee vested in C. S. and his heirs, first for the use of himself during his life, and then for the use of such of his children as should attain the age of twenty-one years, and that, when all of this class had been determined finally, the use would shift to them in fee and be executed by the statute of uses. *Held, also*, that the word "remainder" in the habendum clause did not prevent this construction of the deed, the whole clause taken together showing that the word was not used in its technical sense.

PETITION, filed in the Land Court on October 29, 1906, for the registration of title to certain real estate in the town of Ludlow, the petitioner claiming title under conveyances, through a third person, from James L. Simonds and Frederick W. Simonds, the two sons of Charles A. Simonds.

The respondents were Jennie E. (Simonds) Bishop, Gertrude M. Simonds and Lottie J. Simonds, the three daughters of Charles A. Simonds, all of whom were minors at the date of the death of their father, although Jennie E. Simonds, after-

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wards Jennie E. Bishop, had become of age when the petition was filed. Both the petitioner and the respondents claimed title under a deed from Lucius Simonds to Charles A. Simonds dated September 9, 1886.

In the Land Court the case was heard by *Davis*, J. The material portions of the deed in question as well as the other material facts which appeared in evidence are stated in the opinion.

The petitioner asked the judge to rule that she had a title in fee simple to the premises described in her petition. The judge refused so to rule, and ruled that the petitioner had not, under the deed from Lucius to Charles A. Simonds and the subsequent deeds from James L. and Frederick W. Simonds, title to a legal estate in fee simple to the premises described in her petition. He dismissed the petition; and the petitioner alleged exceptions.

F. H. Stebbins, for the petitioner.

J. H. Reilly, for the respondents.

RUGG, J. In 1886 one Lucius Simonds, the grandfather of the respondents, made a deed of certain land to his son, Charles A. Simonds. The deed recited as the consideration $1,000. The granting clause of the deed was as follows: "I . . . do hereby remise, release, and forever quitclaim unto the said Charles A. Simonds his heirs and assigns." After a description of the land, comes the other material language, namely: "Reserving to myself the right at any and all times to cut and remove from any and all said tracts so much of the wood and timber growing thereon as I shall from time to time see fit and retain the same to my own use. To have and to hold the afore granted premises to the said Charles A. Simonds during the term of his natural life remainder to such of the children of said Charles A. as shall arrive at the age of twenty-one years their heirs and assigns, to their use and behoof forever.

So that neither I the said Lucius Simonds nor my heirs, nor any person or persons claiming from or under me or in the name, right or stead of me or them by any way or means, have any estate, right title or interest of in and to the aforesaid premises with the appurtenances except as aforesaid."

At the time of the execution of this deed Charles A. Simonds was living on said land with his wife and one child, the respond-

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ent Jennie. His two sons, James L. and Frederick W. were not then twenty-one years of age, and were not living at home. Charles A. Simonds died on February 2, 1902, leaving as his only children said two sons, both of whom were then over twenty-one years of age, and three daughters, Jennie E., Gertrude M. and Lottie J., all of whom were then minors. No child deceased before his death had attained the age of twenty-one years. Jennie E. had become of age when this petition was brought. After the death of Charles A. Simonds all of the interest of James L. and Frederick W. in the real estate was conveyed through a third person to the petitioner.

The question is as to the meaning of the deed of Lucius Simonds. A cardinal rule in the interpretation of conveyances is that every deed should be so construed as to give effect to the intent of the parties, unless inconsistent with some rule of law or repugnant to the terms of the grant. *Packard* v. *Old Colony Railroad*, 168 Mass. 92. The first step then is to ascertain the meaning of the words used in the deed. In our present republican civilization, where primogeniture does not prevail, the mind does not readily adjust itself to a purely arbitrary preference of older to younger children. In the absence of some particular reason, the custom of people, as well as the provision of the statutes, is for an equal division among children. To the ordinary understanding the meaning conveyed by the language of the habendum clause is that the son is to have an estate for life, and that thereafter all his children, grandchildren of the grantor, who reach the age of twenty-one years, regardless of the time when any one of them may attain majority, shall share equally. If after the words, "age of twenty-one years," there had been inserted the words, "whether before or after the death of the said Charles A.," there could be no possible dispute as to the meaning of the grantor. Yet these words only accentuate the meaning which the expression, actually employed, conveys in the common conception of mankind. One way to test the meaning of the language used is to suppose that, immediately after the delivery of the deed, Charles A. Simonds had died. If this event had thus happened, there would then have been no one of his children of a sufficient age to become immediately entitled to the estate. If it be assumed that a con-

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tingent remainder is created, in the case supposed it must fail and the estate revert, for the reason that a contingent remainder must take effect immediately upon the termination of the prior estate, or fail altogether. It is plain, therefore, that the deed cannot be construed as creating a contingent remainder in such children of Charles A. Simonds as shall arrive at the age of twenty-one years, without wholly defeating, in the contingency suggested, the intent of the grantor. Another criterion of the signification of the words is to ascertain how they would be interpreted if found in a devise to trustees. No doubt can be entertained that in such an instrument it would be held that the children who reached majority, either before or after the termination of the life estate, would take. *Astley* v. *Micklethwait*, 15 Ch. D. 59. But further language of the deed is decisive that it was not intended to create a contingent remainder. The grantor, in the body of the instrument, at the close of the description, reserves to himself for his life the right to cut wood and timber on the granted premises, and, as a part of the habendum clause, expressly states that neither he nor those claiming under him by grant or descent have "any estate, right, title or interest of in or to the aforesaid premises with the appurtenances except as aforesaid." The position and subject matter of this clause show that it refers only to the reservation excepted out of the conveyance and immediately preceding the habendum clause. Hence the intent of the grantor is made clear by emphatic phrase, that no possibility of reversion is left in himself. But if it be held that a contingent remainder was created by the deed, and Charles A. Simonds had died before any of his children had attained majority, there would then be a revesting of the entire estate in the grantor, for the reason that it would not be possible for the remainder to take effect instantly on the termination of the prior estate. But this would be directly contrary to the express terms of the deed.

It is perhaps possible that the intent of the grantor may be given effect by holding that the deed created a vested remainder in all children of Charles living at the delivery of the deed, subject to open and let in after born children, and to be divested by death during minority. *Riley* v. *Garnett*, 8 DeG. & S. 629,

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Bromfield v. *Crowder*, 1 B. & P. 313. *Edwards* v. *Hammond*, 3 Lev. 132. *Musket* v. *Eaton*, 1 Ch. D. 435. *Jull* v. *Jacobs*, 3 Ch. D. 703. *Pearks* v. *Moseley*, 5 App. Cas. 714. *Blanchard* v. *Blanchard*, 1 Allen, 223. See however *Inman* v. *Rolls*, [1893] 3 Ch. 518. But it is not necessary to place the decision upon this ground or to strain the language from its natural import to effectuate the intent manifested by the instrument. Nor are we required to discuss *Festing* v. *Allen*, 12 M. & W. 279, and analyze the many cases in which it has been followed or criticised. See *Cunliffe* v. *Brancker*, 3 Ch. D. 393; *Browne* v. *Browne*, 8 Sm. & G. 568; *Patching* v. *Barnett*, 49 L. J. Ch. 665.

On other reasoning the intent of the grantor can be carried into effect.

The granting clause of the deed is in the ordinary form of a quitclaim deed, and is adapted to a conveyance to uses. It is to "Charles A. Simonds his heirs and assigns." This conveyed the fee. The habendum clause grants a life estate to Charles A. Simonds with an estate in fee to such of his children as attain majority. This is an attempt to create one estate in fee simple to commence in the future at the time of an occurrence not sure to come to pass, that is on their reaching twenty-one, upon another estate in fee simple. This can be done by way of a use. No set form of words is required in a conveyance to uses, and the present deed is not wholly inapt, even if this was the precise intent of the draftsman. *Leonard* v. *Southworth*, 164 Mass. 52. *Thatcher* v. *Omans*, 3 Pick. 521. *Carr* v. *Richardson*, 157 Mass. 576. The use was not immediately executed by the statute of uses, for the reason, as before pointed out, that the grantor contemplated the possibility of a gap intervening between the termination of the life estate in his son and the commencement of the fee in his grandchildren. It was possible that none of the latter might have been in position to take at the termination of the life estate. It would then have operated probably as a springing use, not coming into existence in derogation of any other estate, nor necessarily at the termination of the first estate created by the deed, but upon the happening of an independent though uncertain future event, namely, when any of the class named reached the age answering to the description of the *cestui que use* and were thus able to take. It has turned out to be the fact

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that it was not possible, at the termination of the life estate, to determine all who might ultimately answer the terms of the description, although two were then certain. It must operate therefore as a shifting use. The fee vested in Charles A. Simonds and his heirs and assigns to hold first for the use of Charles A. Simonds during his life, and then for the use of such of his children as should attain majority. When all who constitute this class are finally determined, the use shifts to them in fee, being executed by the statute of uses. *Second Congregational Society* v. *Waring*, 24 Pick. 304. *In re Lechmere*, 18 Ch. D. 524. *Miles* v. *Jarvis*, 24 Ch. D. 633. *Dean* v. *Dean*, [1891] 3 Ch. 150. *Blackman* v. *Fysh*, [1892] 3 Ch. 209. *In re Wrightson*, [1894] 2 Ch. 95.

There is nothing at variance with this view in the well settled rule that a limitation, if it can so operate, is to be construed as a remainder, and not as an executory devise, even if the rule be conceded to apply with equal force to springing and shifting uses. That rule is adduced to give effect to the intent of the maker and carry out the terms of the instrument. Its invocation here could only thwart that intent and defeat those terms. Hence it has no application. Nor is the use of the word "remainder" in the habendum clause decisive that a technical remainder was intended. The whole clause must be construed together, in order to ascertain its sense, and its true significance must be declared even though a popular rather than a strict meaning be attached to particular words. *Dole* v. *Keyes*, 148 Mass. 237.

Exceptions overruled.

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COMMONWEALTH *vs.* W. E. ELLSWORTH JEWELLE.

Hampden. September 22, 1908. — October 19, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Practice, Criminal, Exceptions. *Physicians and Surgeons. Constitutional Law. Statute. Words,* "Practice of medicine."

Exceptions at the close of the charge of the judge presiding at the trial of a complaint against the defendant for the commission of a crime, which merely state that they are to the judge's "rulings and refusals to rule," do not give the excepting party the right to object to the charge as a whole, or to statements therein regarding matters to which he did not call the judge's attention.

The science of medicine includes a knowledge, not only of the functions of the organs of the human body, but also of the diseases to which such organs are subject and of the laws of health and the mode of living which tend to avert or overcome disease, as well as of the specific methods of treatment that are most effective in promoting cures, and is not limited to that department of knowledge which relates to the administration of medicinal substances.

One, who is not lawfully authorized and registered to practise medicine within this Commonwealth, may "practise medicine" and thus violate the provisions of R. L. c. 76, § 8, which impose a penalty in case a person so unauthorized and unregistered practises medicine, although he assumes to practise as a member of one of the schools, members of which by § 9 are excepted from the provisions of § 8 "if they do not violate any of the provisions" of that section, and although he does not prescribe or deal out a substance to be used as a medicine.

At the trial of one charged under R. L. c. 76, § 8, with practising medicine although not lawfully authorized or registered so to do, there was evidence tending to show that the defendant, who did not contend that he had any knowledge of drugs or of disease in the ordinary sense, at times made diagnoses of his patients, and prescribed medicines for them. *Held,* that there was evidence warranting a conviction.

R. L. c. 76, § 8, imposing a penalty for the unauthorized practice of medicine by persons not properly registered in accordance with the statute, is constitutional.

COMPLAINT, received and sworn to in the Police Court of the City of Springfield September 14, 1906, under R. L. c. 76, § 8, charging the defendant with practising medicine without being lawfully authorized so to do or registered as a practitioner of medicine.

On appeal to the Superior Court, there was a trial before *Crosby,* J. The defendant was convicted and alleged exceptions. The facts are stated in the opinion.

The case was submitted on briefs.

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R. J. Talbot, for the defendant.

S. S. Taft, District Attorney, for the Commonwealth.

KNOWLTON, C. J. The defendant was convicted under a complaint charging him with a violation of the R. L. c. 76, § 8, by practising medicine in this Commonwealth without being lawfully authorized so to do. There was conflicting evidence at the trial in regard to what he had done. To quote from the judge's charge, "The Commonwealth says also that upon different occasions the defendant has prescribed medicines, and administered and advertised that he prescribed as a part of his treatment, what he called 'vitalizer,' and that he has been in the habit of giving what are called electric or ray baths, and that on one or more occasions in the giving of what was called the stomach wash, another substance than water was in the tumbler, which was taken by the patient." There was also evidence that on different occasions he "did make a diagnosis of the patients, for the purpose of ascertaining what ailed them and that then he prescribed for them treatment which was afterwards administered to them." The defendant did not admit this. In his charge the judge said, "The defendant does not claim that he has any knowledge of drugs or of disease in the ordinary sense in which that word is used. I understand him to testify that he did not understand about diseases, that he did not treat disease; but that he treated the healthy portion of the body."

The defendant asked the presiding judge to rule that, "There is no law against a person being a mind cure healer, or a massage healer, or an osteopathist; he can practise his healing so long as he did not prescribe or deal out medicine." The defendant excepted to the refusal of the judge to give in terms the last part of this request. He also excepted to the "rulings and refusals to rule."

This latter exception cannot avail the defendant to open objections to the charge as a whole, or to statements in the charge on matters to which the judge's attention was not called by the defendant. *Curry* v. *Porter*, 125 Mass. 94. *Commonwealth* v. *Meserve*, 154 Mass. 64, 65. Under the decision in *Brick* v. *Bosworth*, 162 Mass. 334, nothing more than the refusal of the request and the rulings given upon the specific matters to which

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attention was called by the request is opened by such an objection.

The first part of the request was plainly covered by the judge's charge. As to the last clause of the request, the charge was, in substance, that such a person can practise his healing or treatment in either of these ways, so long as he does not go beyond the practice or treatment that is fairly included in such of these methods as he adopts, and practise medicine within the meaning of the R. L. c. 76, § 8, otherwise than by using one or more of these methods. The defendant's request implied that one could not practise medicine within the meaning of the words in § 8 without prescribing or dealing out medicine, that is, prescribing or dealing out a substance used as a remedy for disease. The judge allowed the jury to find that one might practise medicine within the meaning of the statute, that is, might practise the healing art, or the art or science which relates to the prevention, cure or alleviation of disease, without necessarily prescribing or dealing out a substance to be used as a medicine. In this we think he was right. It would be too narrow a view of the practice of medicine to say that it could not be engaged in in any case or class of cases otherwise than by prescribing or dealing out a substance to be used as a remedy. The science of medicine, that is, the science which relates to the prevention, cure or alleviation of disease, covers a broad field, and is not limited to that department of knowledge which relates to the administration of medicinal substances. It includes a knowledge, not only of the functions of the organs of the human body, but also of the diseases to which these organs are subject, and of the laws of health and the modes of living which tend to avert or overcome disease, as well as of the specific methods of treatment that are most effective in promoting cures. It is conceivable that one may practise medicine to some extent, in certain classes of cases, without dealing out or prescribing drugs or other substances to be used as medicines. It is conceivable that one may do it in other ways than those practised as a part of their respective systems, by either "osteopathists, pharmacists, clairvoyants or persons practising hypnotism, magnetic healing, mind cure, massage cure science, or the cosmopathic method of healing."

The purpose of the statute seems to be to permit the practice

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of these several methods of treatment, including everything that strictly belongs to each; but not to permit the unlicensed practice of medicine otherwise. If a practice of medicine otherwise, without dealing out or prescribing drugs or other substances to be used as medicine, is possible, the rulings and refusals to rule were right. We think such a practice of medicine is possible.

There is nothing in the bill of exceptions, except the statements in the judge's charge, to show what the facts were upon which the Commonwealth relied. There were no other requests for instructions as to what would constitute the practice of medicine, and there is nothing to show that more specific instructions were necessary. Much less is there any exception to the failure to instruct more particularly as to what would constitute the practice of medicine.

There is much to indicate that the defendant not only practised medicine in other ways, but that he dealt out substances to be used as medicines, which did not apply to the practice of osteopathy, mind cure or massage. These exceptions must be overruled.

The defendant also excepted to the refusal of the court to grant his motion to dismiss the complaint, on the ground that the statute is unconstitutional. The question thus raised was decided against the defendant's contention in *Commonwealth* v. *Porn*, 196 Mass. 326.

Exceptions overruled.

HENRY J. PERKINS COMPANY *vs.* AMERICAN EXPRESS COMPANY.

Hampden. September 22, 1908. — October 19, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Carrier, Of goods. *Express Company*. *Evidence*, Remoteness.

Discussion by SHELDON, J., of the effect of a special contract, made with a carrier of goods by the consignor, upon the liability of the carrier in an action against him by the consignee, which is not based upon a definite contract of shipment between the carrier and the consignee, for failure to deliver the goods to the consignee in as good condition as they were when received by the carrier for

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transportation; and also of the effect of such a special contract between the consignor and the carrier, when a definite contract as to the shipment previously had been made between the consignee and the carrier.

At the trial of an action of contract by one to whom peaches were consigned, against an express company which had received them for transportation, to recover for loss of value in the peaches alleged to have been due to improper icing of cars by the defendant, the plaintiff contended and introduced evidence tending to show that he had made a special contract with the defendant to the effect that the cars furnished by the defendant should be cooled before the peaches were put into them. The defendant contended and introduced evidence tending to show that the contract of shipment was made, not by the plaintiff, but by the consignor and that there was no provision that the cars should be so iced. The presiding judge instructed the jury that the testimony as to the contract between the consignor and the defendant should be disregarded unless they should find that the consignor was acting for the plaintiff, the consignee, and the defendant excepted. *Held*, that the defendant's exception should be sustained, since the jury were not bound to find in accordance with the plaintiff's contention, but might on the evidence have found that the only real contract of shipment was made with the consignor and that the defendant therefore was not liable.

It is within the discretion of the judge presiding at a trial, where the value of peaches at the termination of a two weeks' journey on an express car is in question, to exclude evidence as to the price paid to the grower for the peaches at wholesale when they were delivered from the orchards to the carrier.

CONTRACT upon an alleged agreement of the defendant with the plaintiff to transport peaches from Hyde's Crossing in New York to Springfield and Boston in cars which should be iced, and to maintain in the cars used to carry the peaches "a proper temperature for preserving said peaches during their transportation," the declaration alleging that a proper preserving temperature was not maintained, due to the cars not being properly iced. Writ in the Superior Court for the county of Hampden dated May 15, 1907.

There was a trial before *Wait*, J. The plaintiff introduced evidence tending to show that, early in September, 1906, one Brown, an employee of the defendant, called at the plaintiff's place of business, showed to the plaintiff's officer, named Perkins, a circular letter from the defendant addressed to its various agents about the fruit crops in western New York, and solicited the business of the plaintiff; that one of the plaintiff's officers stated to Brown that his company was figuring then on going into a deal in western New York; that Brown stated that the defendant would have all the cars properly iced, and would have refrigerator cars to be used for the carrying of these peaches;

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that it had plenty of ice at or near the loading stations to load the cars properly with ice so that the refrigeration would be satisfactory in every way; that, subsequently, on September 7, the plaintiff made a contract with one Bradley and one Potter of western New York to take the product of their peach orchards, and, two or three days later, the representatives of the plaintiff whom Brown previously had interviewed had another conversation with him and told him that the plaintiff company was going to purchase about twenty thousand baskets of peaches, and asked what kind of service the defendant was going to give; that Brown replied that the plaintiff company would have plenty of refrigerator cars and that they would be properly iced.

One Murphy, a witness called by the plaintiff, testified that he was employed by the plaintiff, that he went to western New York for the plaintiff to oversee the picking, packing and shipping of the peaches, and the carrying out of the contract between the plaintiff company and the fruit growers, Bradley and Potter; that the cars were loaded on a siding at Hyde's Crossing; that there was no office of the defendant at that place, the nearest express agency being at Appleton, about five miles west of there; that the first shipments to the plaintiff had begun to be made before the witness arrived in western New York, and that the arrangements for those shipments had been made either by Bradley or by Potter; that upon his arrival he talked with the agent of the defendant at Appleton, and was told by that agent that the cars would be properly iced at Morton, which was thirty-one miles east of Hyde's Crossing, and also in transit; that several times before the shipments in question were made he requested the defendant's agent at Appleton to furnish cars that were iced before the peaches were put into them; that he was told by the travelling agent of the defendant company that the cars would be properly iced along the line; that before the shipments in question he called up by telephone the agent of the defendant at the head office in Rochester to see if he could have the cars with initial icing, so that they would be cold when loaded, and was told that the cars would be iced before coming to Hyde's Crossing to be loaded.

Further evidence introduced by the plaintiff tended to show that the cars in question were not iced or cooled when the

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peaches were put on board, and were not iced properly along the route, and that as a result the peaches when delivered to the plaintiff were of much less value than they would have been if the cars had been iced when the peaches were put on board and had been kept iced along the route.

One Bradshaw, a witness called by the defendant, testified that he was the agent of the defendant at Appleton; that he waybilled the cars in question, in the fall of 1906; and, before each of them was shipped, had a conversation with Bradley, who on each occasion called the witness by telephone, notified him that a car was loaded, gave him the number of the car, stated the number of baskets put into the car, gave the initials, said where and to whom it was going, said that such car was without ice, and requested that it be iced at Morton; that the witness on each occasion replied to Bradley that the car shipped would be iced at Morton.

From the waybills of the cars in question it appeared that each of the three shipments was received from Bradley.

Bradley, called by the defendant, testified that he was a farmer engaged in the fruit growing business, and that, on September 7, he and one Potter, also a farmer, entered into a contract with the plaintiff to sell the entire product of their peach orchards for that season; that he, Bradley, attended to the billing of all the cars; that he talked with the agent of the defendant at Appleton, who stated that all the cars would be iced at Morton in good shape; that Murphy, the representative of the plaintiff company, when he arrived, requested the witness to order the cars for him from the express agent; that he did order the cars and did the billing of them; that he talked by telephone with the express agent at Appleton every time a car was to be shipped, told the agent the number of the car, to whom and where it was to go, the number of the baskets in the car and to have it iced at Morton and re-iced in transit; that he had such a conversation with the express agent in regard to each of the three cars in question; that he arranged for the shipment of each car in that way.

The defendant also introduced evidence tending to show that each of the cars in question was iced to its full capacity at Morton, and properly iced along the route.

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The charge of the presiding judge with regard to Bradley, referred to in the opinion, was as follows: "With regard to what contract was made with the defendant company either at Rochester or at Hyde's Crossing, you can't give any weight as to what was said by either Mr. Bradley or Mr. Murphy, unless you are satisfied from the other evidence in the case that they were authorized to act for the plaintiff in doing what they did. There is testimony of Mr. Murphy and of Mr. Perkins, too, with regard to what Mr. Murphy was authorized to do, what his general powers were. If he was acting within those powers in arranging with the defendant company for cars at Hyde's Crossing, then the plaintiffs are bound by what he said and did. And it is the same way with Mr. Bradley. If Mr. Bradley was authorized by the plaintiffs, or was authorized by Mr. Murphy, who had authority from them to give such authority, then the arrangements which he made with the defendant company would be binding upon the plaintiff."

At the conclusion of the charge, the defendant requested the presiding judge to save its exception to the above ruling in the charge, the defendant's counsel suggesting that, in the defendant's view of the case, Bradley was the consignor, that Bradley made the contract with the defendant, and that the special contract made by Bradley as consignor was binding upon the plaintiff as the consignee, and the plaintiff would also be bound by any risks which Bradley as consignor assumed.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

Other facts are stated in the opinion.

A. M. Pinkham, for the defendant.

E. W. Beattie, for the plaintiff.

SHELDON, J. We regard it as settled that in a suit by a consignee against the carrier of goods for loss of or injury to the goods in transit, the defendant ordinarily may show that the consignor had made with it a special contract of shipment, and that the consignee receives the shipment subject to the terms of such special contract and to the risks thereby assumed by the consignor. *Squire* v. *New York Central Railroad*, 98 Mass. 239, 248. *Finn* v. *Western Railroad*, 112 Mass. 524, 534. *Hill* v. *Boston, Hoosac Tunnel & Western Railroad*, 144 Mass. 284. *Cox*

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v. *Central Vermont Railroad*, 170 Mass. 129, 136. See to the same effect *York Co.* v. *Central Railroad*, 3 Wall. 107, 113; *Donovan* v. *Standard Oil Co.* 155 N. Y. 112; *Shelton* v. *Merchants' Despatch Transportation Co.* 59 N. Y. 258; *Nelson* v. *Hudson River Railroad*, 48 N. Y. 498; *Robinson Bros.* v. *Merchants' Despatch Transportation Co.* 45 Iowa, 470; *Christenson* v. *American Express Co.* 15 Minn. 270; *Mouton* v. *Louisville & Nashville Railroad*, 128 Ala. 537, 544. The consignee may maintain an action against the carrier for a breach of the duty imposed upon the latter by law. If this duty has been varied by a contract between the carrier and the consignor, being the contract under which the goods were received and transported by the carrier, the consignee may still sue the carrier, but his rights are subject to the terms of the special contract. And a consignee who has title to the property carried may sue the carrier in contract upon the carrier's implied agreement to deliver the goods to the consignee. But this implied agreement is subject also to the terms of any express contract made by the carrier with the consignor. These doctrines are fully sustained by the cases already referred to.

But it is also settled that where a definite contract of shipment has been made between the consignee or owner and the carrier, this binds both parties as between themselves, and cannot be varied by any subsequent arrangement or agreement made with the carrier by the consignor or any other person acting in the shipment, unless of course such person has authority from the consignee to alter the original contract. This was held in *Jennings* v. *Grand Trunk Railway*, 127 N. Y. 438, 449, *Waldron* v. *Fargo*, 170 N. Y. 130, 154, and *Ohio & Mississippi Railway* v. *Hamlin*, 42 Ill. App. 441. It is the underlying reason for the decisions in *Perry* v. *Thompson*, 98 Mass. 249, 253, *Russell* v. *Erie Railroad*, 41 Vroom, 808, and *Hayes* v. *Campbell*, 63 Cal. 143. It is the rule stated in 1 Hutchinson on Carriers, (3d ed.) § 459, with citation of cases. To hold otherwise would be to say that one party to a contract might relieve himself from its obligations without the consent or knowledge of the other by merely making an inconsistent agreement with a third party.

But in the case at bar one of the matters in dispute was whether the goods in question had been transported under an

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original agreement with the plaintiff, or whether it appeared that there had been nothing more than some preliminary negotiations with it in Springfield or with its representative Murphy in Western New York, and that the actual shipping agreement had been made between the defendant and Bradley, one of the shippers of the goods. As in *Waldron* v. *Fargo*, 170 N. Y. 130, already referred to, this question should have been submitted to the jury. The presiding judge apparently assumed that it was not in dispute that the agreement for the shipment had been made between the plaintiff and the defendant, and carefully and accurately instructed the jury as to the terms of this agreement and the rights and duties of the parties growing out of it. There is in the bill of exceptions some justification for this assumption. But we think that it does sufficiently appear that the question with whom the defendant's agreement was made was in issue, as well as the question as to the terms of such agreement. The defendant's counsel, in saving his exceptions to the rulings made in the charge to the jury, expressly stated his contention that Bradley was the consignor of the goods, that he made the contract with the defendant, and that the special contract made by him as the consignor was binding upon the plaintiff as the consignee.

Under the rulings made, the jury may have been obliged to refrain from considering what was said and done by Bradley, on the ground that he had no authority to act for the plaintiff. If so, they might well have found that the talk between Perkins and Brown did not itself amount to a concluded contract, that the only contract of the defendant was made with Murphy as the plaintiff's representative at Rochester or at Hyde's Crossing, and that the terms of this contract were as claimed by the plaintiff. If they had been allowed to consider the testimony as to Bradley, it may be that they would have found that the only real contract of shipment was made between the defendant and him acting as consignor of the goods, and that the plaintiff was bound by this agreement. Accordingly, there must be a new trial.

As the question of admitting evidence of the price paid for these goods at Hyde's Crossing may arise again, it is proper to say that we see no error in excluding that evidence. The plain-

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tiff's damages depended upon the market value of the peaches in Springfield and Boston respectively. Evidence of the price paid for them in the orchard at Hyde's Crossing might have a bearing upon their market value there in their condition at that time. But the judge had a right to exclude it as bearing too remotely upon their market value in baskets at Boston or Springfield one or two weeks later. Both the condition and the location of the property had become greatly changed, and there was nothing to show that the changed circumstances had produced no change in the market value, as in *Croak* v. *Owens*, 121 Mass. 28. It was not simply the short lapse of time, but the considerable change in situation and condition that must be considered. There is nothing inconsistent with this in *Eaton* v. *Mellus*, 7 Gray, 566, *McAvoy* v. *Wright*, 137 Mass. 207, or *White Sewing Machine Co.* v. *Phenix Nerve Beverage Co.* 188 Mass. 407, relied on by the defendant.

Exceptions sustained.

MARTHA J. FIELD *vs.* ROBERT GOWDY.

Hampden. September 22, 1908. — October 19, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Nuisance. Municipal Corporations, By-laws and ordinances. *Evidence*, Violation of ordinance as evidence of maintenance of nuisance, Of experiments, Photographs.

In an action against one in control of a house for personal injuries alleged to have been incurred while travelling on a public sidewalk by reason of a nuisance maintained by the defendant, if there is evidence that from two spouts on the defendant's house, one about eleven feet from the street line and the other a number of feet nearer, water was conducted from the roof and turned upon a concrete walk of the defendant, from whence by reason of the natural grade of the walk it flowed to the sidewalk, where it froze in a ridge about three inches in thickness in the middle, this is sufficient to warrant a finding that the defendant collected the surface water in an artificial course and poured it upon the public way in such a manner as to create a nuisance.

In an action against one in control of a house for personal injuries alleged to have been incurred while travelling on a public sidewalk by reason of a nuisance maintained by the defendant, if there is evidence warranting a finding that the defendant collected the surface water from his roof in an artificial course and poured it upon the sidewalk in such a manner as to create a nuisance by freezing in a ridge, it is no defense for him to show that there was a depression or

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gully in the sidewalk, into which the water from his spout flowed and froze, and that but for this defect in the sidewalk the water would have run off before it froze, as a landowner in turning water upon a public way is bound to take into account its actual condition and to determine at his peril whether his act in conjunction with the condition of the way will create a nuisance.

One in control of a house maintaining spouts which collect surface water from his roof and pour it upon the sidewalk of a public way in such a manner as to cause a nuisance in freezing weather, is liable for an injury thus caused if by the exercise of ordinary care he would have known that the storm water from his house in conjunction with a depression or gully in the sidewalk produced a dangerous condition.

A by-law of a town, providing that "No person shall permit water from the eaves or leader pipes of any building owned or cared for by him to be discharged upon the sidewalk — or make or permit any drain, sluice, gulley or conduit upon his land to discharge water upon the sidewalk —" not only prohibits a direct and immediate discharge of water upon a sidewalk without any intervening agency, but includes as well cases where a house standing back from the street is so fitted with eaves and leader pipes that the collected water flows down an inclined concrete walk on the land of the householder to the sidewalk of a highway.

In an action against one in control of a house for personal injuries alleged to have been incurred while travelling on a public sidewalk by reason of a nuisance maintained by the defendant, where there is evidence warranting a finding that the defendant collected the surface water from his roof by spouts which poured it upon the sidewalk in such a manner as to create a nuisance by freezing in a ridge, it is proper to admit in evidence a by-law of the town in which the house is situated prohibiting the discharge of water upon a sidewalk from the eaves or leader pipes of any building, of which the acts of the defendant were a violation, such violation of the by-law being competent evidence to be considered with all the other circumstances as bearing upon the question of the maintenance of a nuisance by the defendant, although not conclusive upon that issue.

In an action against one in control of a house for personal injuries alleged to have been incurred while travelling on a public sidewalk by reason of a nuisance maintained by the defendant, where there was evidence warranting a finding that the defendant collected the surface water from his roof by spouts which poured it upon an inclined concrete walk on the land of the defendant, down which it flowed to the sidewalk of a public way in such a manner as to create a nuisance by freezing in a ridge, the defendant offered evidence to show that since the accident there had been no changes in the grade, the ground or the laying out of the defendant's premises, the walk or the eaves spouts, and then offered a photograph taken while the trial was in progress during a rain storm of much greater severity than any occurring near the time of the accident, for the purpose of showing the directions taken by water thrown from the spouts and after it reached the defendant's walk, and that such water did not and could not flow to the public sidewalk. The judge excluded the photograph. The defendant excepted to its exclusion. The ground of the judge's ruling was not stated. A photograph of the place when there was no storm was admitted in evidence. *Held*, that the photograph excluded was at the best a photograph of an experiment, and that it was the duty of the judge to determine, as a matter of discretion, the preliminary question whether the conditions were sufficiently similar to make the observation recorded in the photograph of any value in aiding the

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jury to pass upon the issue to be submitted to them, that the exercise of this discretion could not be interfered with unless plainly wrong, and that there was nothing in the present case to show that the exclusion of the photograph was error.

TORT for personal injuries incurred at about six o'clock in the afternoon of December 12, 1904, while the plaintiff was travelling on foot over a concrete sidewalk on Chapel Street, a public way in the town of Westfield, from falling by reason of stepping on a ridge of ice formed from water which had flowed upon the sidewalk from spouts upon the house of the defendant. Writ dated January 20, 1905.

In the Superior Court the case was tried before *Hitchcock*, J. The facts which could have been found upon the evidence presented at the trial are stated in the opinion. The judge refused to rule that the plaintiff was not entitled to recover, and also refused to make other rulings requested by the defendant, making the rulings which are described in the opinion. The jury returned a verdict for the plaintiff in the sum of $900; and the defendant alleged exceptions.

The case was submitted on briefs.

H. W. Ely & J. B. Ely, for the defendant.

R. J. Morrissey, J. B. Carroll & W. H. McClintock, for the plaintiff.

RUGG, J. This is an action of tort by the plaintiff, a traveller upon a public sidewalk, against the defendant, an abutting landowner, for collecting water from his roof and conducting it through a spout to his own walk, whence it flowed by natural slant to the public walk and froze, so that the plaintiff while walking with due care after dark on a December day slipped and was injured.

1. The refusal of the trial judge to rule that the plaintiff was not entitled to recover was correct. There was evidence that the plaintiff was in the exercise of due care. A landowner has a right to change the surface of his lot, or improve it by the construction of buildings or by other means, in any lawful manner, and if the natural course of surface water is thereby altered no liability is imposed on him. But he has no right to collect water into a definite channel by a spout or otherwise and pour it upon a public way. If he does this and through the operation of natu-

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ral causes the water freezes, he is the efficient cause in the creation of a nuisance and is liable for whatever damage ensues as a probable consequence. *Cavanagh* v. *Block*, 192 Mass. 63. *Hynes* v. *Brewer*, 194 Mass. 435. *Leahan* v. *Cochran*, 178 Mass. 566. There was evidence tending to show that from two spouts on the defendant's house, one about eleven feet from the street line and the other nearer by the width of a piazza, water was collected from the roof and turned upon his concrete walk, and by the natural grade of the walk, flowed to the sidewalk where it froze in a ridge across the width of the public walk about three inches in thickness in the middle. This was sufficient to warrant a finding that the defendant collected the surface water in an artificial course and poured it upon the public way in such a manner as to create a nuisance. *Moore* v. *Gadsen*, 87 N. Y. 84, is distinguishable on the ground that no water was there collected in a definite channel; that falling upon the lot was permitted to flow according to gravity without being gathered.

2. There was evidence from which it was argued that there was a depression or gully in the sidewalk, into which the water from the defendant's spout flowed and froze. Upon this aspect the defendant asked for rulings in substance that the plaintiff could not recover, if the water would have run off, but for the defect in the sidewalk, and that the defendant in maintaining his premises was not obliged to take into account the effect of this condition. This request was refused, and the jury instructed that if the defendant materially contributed to the cause of the defect, which occasioned the plaintiff's injury, he would not be excused because some other cause also contributed, and that if the defendant's conductor was a nuisance and water from it froze on the sidewalk, so as to be dangerous, the defendant would be liable, even if the sidewalk was otherwise dangerous. No error is here disclosed. The town and the defendant were not joint tortfeasors in producing the dangerous condition of the sidewalk, which resulted in the plaintiff's injury, yet if each contributed an efficient causal factor, either may be liable. *Mooney* v. *Edison Electric Illuminating Co.* 185 Mass. 547. *Lowell* v. *Glidden*, 159 Mass. 317. *Boston* v. *Coon*, 175 Mass. 283. A landowner in turning water upon a public way is bound to take into account its actual condition, and determine at his peril

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whether his act in conjunction with the way, as it exists from time to time, will create a nuisance. A defect in a highway, when bare, may be so conjoined with snow or ice that both together may operate as a proximate cause, to which an injury may be attributed. *Newton* v. *Worcester*, 174 Mass. 181, 187. An abutting landowner can no more rely upon perfection of conduct in the public officers having charge of highways than upon like conduct in an individual to shield himself from the consequences of his own tortious act. If both are wrongdoers and both contribute to the injury as a cause, each may be liable, though there is no concert of action. *Corey* v. *Havener*, 182 Mass. 250. The verdict of the jury has established the fact of the defendant's wrongdoing. Even though this wrongful act alone may not have been a sufficient cause for the plaintiff's injury, but working concurrently with another wrongful act of a third person, both being efficient causes, the harm is occasioned to the plaintiff, either may be liable. *Feneff* v. *Boston & Maine Railroad*, 196 Mass. 575. In the requests of the defendant, the concurrent operation of two causal wrongful agencies in the creation of the dangerous situation was omitted, and they were properly refused, while the instructions given conformed to the law.

3. The defendant has argued in his brief that there was no evidence as to the length of time the defect in the sidewalk had existed, but that point does not appear to have been raised at the trial, and the portion of the charge dealing with it is not reported. It is now too late to raise the question. The defense was apparently directed to the point that water from the spouts did not flow over the sidewalk. If the defendant had in the exercise of ordinary prudence reasonable notice that his storm water, in conjunction with any other cause, produced a dangerous condition, he is responsible. *Davis* v. *Rich*, 180 Mass. 235.

4. There was admitted in evidence, subject to the defendant's exception, a by-law of the town of Westfield that "No person shall permit water from the eaves or leader pipes of any building owned or cared for by him to be discharged upon the sidewalk — or make or permit any drain, sluice, gully or conduit upon his land to discharge water upon the sidewalk —" It is contended that there was no evidence of a violation of this by-

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law, and that hence it should have been excluded. Its language does not prohibit alone direct and immediate discharge without any intervening agency, but includes as well cases where the house, standing back from the street line, is so fitted with eaves and leader pipes that the collected waters flow with accelerated volume and directed force to the highway. The walk of the defendant may have been found to act as a trough to carry the water from the spout to the sidewalk. There being some evidence of the violation of the by-law, it was competent evidence, to be considered with all the other circumstances, as bearing upon the liability of the defendant, although not conclusively establishing it. *McCarthy* v. *Morse*, 197 Mass. 332. The defendant's request for instruction * upon this branch of the case did not accurately state the law as applicable to the language of the by-law and the other circumstances, and was properly refused. The by-law was not offered for the purpose of establishing a duty on the part of the defendant, violation of which was the sole foundation of the plaintiff's action. The existence of a nuisance cannot be predicated solely upon violation of a municipal ordinance, when the act prohibited is in itself indifferent and no duty exists apart from the ordinance. *Dahlin* v. *Walsh*, 192 Mass. 168. But there was independent affirmative testimony of the tortious act of the defendant in turning the water upon the sidewalk, which subsequently congealed and injured the plaintiff. That this act, which might have been found wrongful in itself, was also a violation of a by-law was a circumstance to be weighed with all other evidence bearing upon the issue. *Finnegan* v. *Winslow Skate Manuf. Co.* 189 Mass. 580. *Newcomb* v. *Boston Protective Department*, 146 Mass. 596. *Glassey* v. *Worcester Consolidated Street Railway*, 185 Mass. 315. See *Doherty* v. *Ayer*, 197 Mass. 241.

5. The defendant, having offered to show that, since the accident to the plaintiff, there had been no change in any of

* The instruction here referred to, which was requested by the defendant and was refused by the judge, was as follows: "4. The by-laws of the town are in no event conclusive, if infringed by the defendant, on the question of liability, and are not to be considered as having any bearing on the case at all, unless the jury can find that the water discharged directly from the conductor on to the public walk."

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the material facts on the face of the earth, proffered a photograph taken in the course of the trial during a rain storm of much greater severity than any occurring near the time of the accident, for the purpose of showing the direction taken by water thrown from the spout and after it reached the defendant's walk and that such water could not and did not flow to the public walk. To the exclusion of this evidence the defendant excepted. The ground of this ruling is not stated. A photograph of the place, when there was no storm, was admitted in evidence. That excluded was at best a photograph of an experiment. A photograph has no higher character as evidence than the experiment itself. Whether the conditions were sufficiently similar to make the observation of any value in aiding the jury to pass upon the issue submitted to them was primarily for the trial judge to determine as a matter of discretion. His decision in this respect will not be interfered with unless plainly wrong. Such observations and experiments, though sometimes admitted, have often been excluded in the discretion of the presiding judge. There is nothing in the present case to show that the exclusion of the photograph was error. *Farrell* v. *Weitz*, 160 Mass. 288. *Dow* v. *Bulfinch*, 192 Mass. 281. *Commonwealth* v. *Tucker*, 189 Mass. 457, 478. *Baker* v. *Harrington*, 196 Mass. 339. The other exceptions were either waived, or were not argued and are treated as waived.

Exceptions overruled.

BESSIE CHADBOURNE *vs.* SPRINGFIELD STREET RAILWAY COMPANY.

Hampden. September 22, 1908. — October 19, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Negligence. Street Railway.

In an action by a woman against a street railway company for personal injuries incurred, when being driven as a guest in an automobile, from being run into by a car of the defendant on a narrow bridge over a railroad, there was evidence on which it could be found that the plaintiff was inexperienced in regard to automobiles and that the driver, whose guest she was, was skilful and experienced

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in that regard, that the automobile was following behind a street car of the defendant which was moving very slowly on the bridge, that there was not room to pass this car on the right, that the driver turned to the left upon the parallel track to pass the car, that when the automobile got on the track its occupants saw another car of the defendant approaching at a high rate of speed from the opposite direction, that the driver brought the automobile to a full stop, but that the car in spite of the efforts of the motorman could not be stopped in time to avoid a collision, and struck the automobile with violence, causing the injuries sued for. *Held*, that the jury well might have found that the plaintiff took a wise course in not attempting to interfere with the driver's management of the automobile, that there was no relation of agency between her and the driver to affect her with negligence on his part and no mutuality in a common enterprise between them, so that the question of the plaintiff's due care was for the jury, and it was not necessary to consider whether the driver was negligent or not.

In an action by a woman against a street railway company for personal injuries incurred, when being driven as a guest in an automobile, from being run into by a car of the defendant on a narrow bridge over a railroad, there was evidence on which it might have been found that the motorman of the car which ran into the automobile was driving it at the rate of about fifteen miles an hour to and upon the bridge, that the approaches to the bridge were at so sharp a grade that a car coming from either side could not be seen by the motorman of a car coming from the other side until both cars were substantially on the bridge, that the automobile had been following behind another car of the defendant which was moving very slowly, that there was not room on the narrow bridge for the automobile to pass the car on the right and there was room to pass it on the left only by travelling wholly or in part upon the parallel track of the defendant, that the driver turned to the left to pass the car, that after the defendant's approaching car and the automobile had become visible from each other, the automobile came to a full stop, but the car in spite of the proper effort then made by the motorman could not be brought to a standstill in time to avoid a collision, and struck the automobile with such force as to move it a considerable distance, causing the plaintiff's injuries. The bill of exceptions contained the following statement: "On the day of the accident there was in force a rule or order of the defendant, with which all its employees running over the bridge were familiar, that two double truck cars should not be on the bridge simultaneously. This rule was made pending the strengthening of the bridge, which was done after the date of the accident." Both of the defendant's cars on the bridge at the time of the accident were double truck cars. *Held*, that the statement that the rule of the defendant above quoted "was made pending the strengthening of the bridge, which was done after the date of the accident," did not overcome the express statement that it was in force at the time of the accident, nor show that it was so far intended merely to protect the defendant's passengers that its infraction could not be regarded as negligence toward others, and, if so, the mere fact of the violation of the rule was some evidence of negligence in running the car, but that, even in the absence of such an express rule, the jury might find that the defendant's cars should not be allowed to obstruct and endanger travellers in other vehicles by passing each other upon so narrow a bridge approached at so steep a grade, and that, in view of all the circumstances, the court could not say that the jury had not a right to find that it was negligent to take the car upon the bridge while another car was upon it at such a rate of speed as might make a collision with another vehicle unavoidable after knowledge of such a danger; consequently, that the question of the defendant's negligence was for the jury.

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TORT for personal injuries received on March 31, 1907, on Plainfield Street Bridge in Springfield, which is a bridge over the tracks of the Boston and Maine Railroad approached at a steep grade at each end, while the plaintiff was being driven as a guest in an automobile by one Reed, an automobile tester, by reason of the automobile, after it had come to a stop, being run into by a car of the defendant alleged to have been operated negligently at a high rate of speed by a motorman in the employ of the defendant. Writ dated June 6, 1907.

In the Superior Court the case was tried before *Wait*, J., who at the close of the plaintiff's evidence ordered a verdict for the defendant. The plaintiff alleged exceptions.

The material facts shown by the evidence appear sufficiently in the opinion. The bill of exceptions contained the following statement: "On the day of the accident there was in force a rule or order of the defendant, with which all its employees running over the bridge were familiar, that two double truck cars should not be on the bridge simultaneously. This rule was made pending the strengthening of the bridge, which was done after the date of the accident." It appeared that both of the defendant's cars on the bridge at the time of the accident were double truck cars.

The case was submitted on briefs.

D. E. Leary, *E. W. Beattie, Jr.*, & *G. D. Cummings*, for the plaintiff.

H. W. Ely & *J. B. Ely*, for the defendant.

SHELDON, J. The question of the plaintiff's due care was for the jury. She seems to have conducted herself as an invited guest of the driver of an automobile or other vehicle naturally would do. She trusted him as to the running of the machine; that is, she did not attempt to interfere with his management of the automobile. In view of her inexperience and of what might have been found to be the skill and experience of the driver, the jury might well have thought that this was a wise course on her part. Nor was there any relation of agency between her and the driver such as of itself would affect her with negligence on his part. She had no right to control him. There was no mutuality in a common enterprise between them. It cannot be said as matter of law that she ought to have warned the driver

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against turning out from behind the car which he had been following, especially in view of the fact that he was turning both in the direction required by statute (R. L. c. 54, § 2), and in the only direction in which the width of the bridge afforded room for him to pass that car. And she had a right to rely somewhat on the acquaintance with the road which she might presume that he had.

Accordingly we need not consider whether it can be said that Reed's conduct was, as matter of law, negligent. Even if this were so, the plaintiff's own due care was for the jury. *Shultz* v. *Old Colony Street Railway*, 198 Mass. 309. *Miller* v. *Boston & Northern Street Railway*, 197 Mass. 585.

It is a more difficult question whether there was any evidence of negligence on the part of the defendant's servants. But it might have been found that the motorman was driving the car which ran into the automobile at a rate of nearly fifteen miles an hour to and upon the bridge. This bridge was so narrow that it was impossible to pass with a vehicle between a car and the guard rail of the bridge; and the approaches to the bridge are at so sharp a grade that, from one side, a car coming from the other side cannot be seen until both cars are substantially on the bridge. Another car of the defendant was coming in the opposite direction, at a very low rate of speed, and any vehicle turning out from behind it necessarily must come upon the track on which the colliding car was coming. Apparently there was considerable travel over the bridge. Under these circumstances, a jury might say that due care required the motorman to keep his car under sufficient control to avoid running into a vehicle approaching behind the other car which might be practically compelled to turn out upon the track in front of him. Moreover, a rule of the defendant in force at this time provided that two double truck cars should not be on the bridge at the same time. And the jury might find that even in the absence of such an express rule the defendant's cars should not be allowed to obstruct and endanger other travellers by passing each other upon so narrow a bridge, approached at so steep a grade. Nor does the fact that this rule, as the bill of exceptions recites, "was made pending the strengthening of the bridge, which was done after the date of the accident," overcome the express statement that it

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was in force at this time, or show that it was so far intended merely to protect the defendant's passengers that its infraction could not be regarded as negligent toward others. But if this is so, the mere fact of the violation of this rule was some evidence tending to show negligence in running the car. *Stevens* v. *Boston Elevated Railway*, 184 Mass. 476. *Burns* v. *Worcester Consolidated Street Railway*, 193 Mass. 63, 66. *Partelow* v. *Newton & Boston Street Railway*, 196 Mass. 24, 31. There was evidence here that after the defendant's car and the automobile had become visible each from the other the automobile came to a full stop, but that the car, in spite of proper effort then made by the motorman, could not be brought to a standstill in time to avoid a collision, but struck the automobile with such force as to move it a considerable distance. In view of all the circumstances, we cannot say that the jury had not a right to find that it was negligent to take the car upon the bridge while another car was upon it, at such a rate of speed as might make a collision with another vehicle unavoidable after knowledge of such a danger. *Tashjian* v. *Worcester Consolidated Street Railway*, 177 Mass. 75, 81. *Williamson* v. *Old Colony Street Railway*, 191 Mass. 144.

For these reasons we are of opinion that the case should have been submitted to the jury.

Exceptions sustained.

VINCENT E. BARNES *vs.* GEORGE W. LOOMIS.*

Hampden. September 22, 1908. — October 20, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Practice, Civil, Exceptions, New Trial.

A bill of exceptions, which sets forth exceptions taken at a trial to rulings of the presiding judge as to the admission and exclusion of evidence, must include all the facts which are necessary to enable this court to decide whether or not the rulings of which the excepting party complains are erroneous.

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* At the trial of this case in the Superior Court, the plaintiff, who was not a lawyer nor one trained in the conduct of trials, acted for himself. He also prepared the bill of exceptions and argued them on his own behalf. The

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An exception to a ruling of the judge who presided at a trial, denying a motion for a new trial based on the grounds that the verdict was against the evidence and the weight of evidence, and that the excepting party after the verdict had discovered new evidence, will not be sustained where it appears that there was evidence which warranted the verdict, and where the reasons of the judge for denying the motion are not shown, especially where it appears that the evidence alleged to be newly discovered was cumulative only.

CONTRACT upon an account annexed for the price of one hundred and ten railroad sleepers alleged to have been sold and delivered to the defendant by the plaintiff. Writ in the Superior Court for the county of Hampden dated November 15, 1905.

The defendant filed a declaration in set-off containing the following account:

"1904

April 4	To cash paid Eastman & Maxwell, for cutting logs on Stowe lot,	$205.26	
Nov. 29	To cash paid to Smith & Hunter, for drawing logs on Stowe,	307.76	
	To costs and expenses incurred at the plaintiff's request,	70.04	
	Total,		$583.06
1901	Credits.		
Dec. 5	By check for labor on Stowe lot,	$189.64	
1902			
Dec. 17	By cash for labor on Stowe lot,	5.27	
Dec. 19	By cash for labor on Stowe lot,	29.03	
	Total,		$223.94
	Balance due,		$359.12"

There was a trial before *Hitchcock*, J. There was evidence that the defendant admitted that he owed the plaintiff the

bill of exceptions is so meagre that it is impossible to find in it sufficient data to make a report of the case which would be intelligible. As to the exceptions to the admission and exclusion of evidence, it contains merely isolated groups of questions and answers, apparently in no way related, and with nothing to explain various allusions and references therein. The reporter, therefore, as did the court, has resorted to a transcript of the evidence which the plaintiff filed with his bill, and, although such transcript is in no sense a part of the record from which the report should be made, has used it for that purpose.

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amount claimed in the declaration. The presiding judge ruled, without exception by the defendant, that there was no evidence tending to prove the first two items charged against the plaintiff in the declaration in set-off. As to the third item of charge, the defendant introduced evidence tending to show that, the defendant having been threatened with a suit by Eastman and Maxwell and having conferred with the plaintiff about it, the latter had said to the defendant, "Let them sue. I will back you up in it," and, after such suit was brought, had gone with the defendant to the latter's attorney, had helped to prepare the defense, and at his own expense had brought witnesses and his sawyer with him to help the defense of the suit.

There was a verdict for the defendant in set-off, and the plaintiff excepted.

The grounds for the motion for a new trial, referred to in the opinion, were as follows: (1) That the verdict was against the evidence and the weight of evidence; (2) "that since verdict was rendered new and important evidence has been discovered by the plaintiff, to wit: That Arthur S. Kneil, of Westfield, who was the attorney of this defendant, George W. Loomis, in the suit of Eastman and Maxwell against said Loomis, asked this plaintiff, at the request of the said Loomis, if this plaintiff would pay the expenses of the said Loomis in defending himself in said suit of Eastman and Maxwell *v.* Loomis, and this plaintiff answered that he would not." The motion was denied, and the plaintiff appealed.

Other facts are stated in the opinion.

V. E. Barnes, pro se.

R. J. Morrissey, for the defendant, filed no brief and did not argue.

MORTON, J. This is an action of contract to recover of the defendant the value of one hundred and ten sleepers or ties at fifty-two cents each, amounting to fifty-seven dollars and twenty cents. The answer was a general denial and payment. The defendant also filed a declaration in set-off. At the trial the defendant relied upon his plea of payment and the declaration in set-off which was upon an account annexed, the first two items of which were for cash paid for cutting and drawing logs on the "Stowe lot," and the third for "costs and ex-

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penses incurred at the plaintiff's request." The remaining items consisted of credits for cash received from the plaintiff for labor on the "Stowe lot." At the close of the evidence the presiding judge, at the plaintiff's request, ruled that the defendant was not entitled to recover upon the first two items in the declaration in set-off, but refused to rule as requested by the plaintiff that the defendant was not entitled to recover upon the third item. The jury found for the defendant on this item in the sum of $14.28, and the case is here on exceptions by the plaintiff to the refusal of the presiding judge to make various rulings which were requested and to various rulings which were made in regard to the admission and exclusion of evidence, and to the overruling of his motion for a new trial.

The bill of exceptions nowhere states either in so many words, or in substance and effect, that it contains all of the evidence relating to the various questions raised. The plaintiff may have intended to frame his bill so as to include all such evidence and may have supposed that he had done so; but, as already observed, it is nowhere so stated in the bill. From the bill of exceptions we have no means of knowing whether the various excerpts of evidence which it contains do or do not set out all of the evidence bearing upon the matters to which they respectively relate. The plaintiff is the excepting party, and as such is bound to see that the bill of exceptions includes all that is necessary to enable us to decide whether the rulings, of which he complains, were or were not erroneous. If all of the evidence in regard to any of the questions raised is not before us, it is manifest that we cannot say whether the rulings of which he complains in relation to such matters were right or wrong. The plaintiff has, however, furnished us with what purports to be a certified transcript by the official stenographer of the evidence and of the judge's charge; and, although it is not made a part of the bill of exceptions, and is nowhere referred to in the bill in any way, we have nevertheless looked into it and considered it in arriving at the conclusions to which we have come. The fact that we have done so in this case is not to be taken, however, as a precedent for similar action in other cases.*

The exceptions taken and argued by the plaintiff number

* See footnote on page 578.

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eighteen in all. Six of them relate to questions and evidence which were admitted against his objection during his cross-examination. One of these questions, "What did you look up the pleadings for the other day?", referring to another case, was admissible on cross-examination as the presiding judge ruled, and at any rate it did the plaintiff no harm.* The question "Was anything said about paying for them?" (the sleepers or ties) was plainly competent. It related to the very demand on which the plaintiff's suit was based. Another of the questions related to the item of costs and expenses in the declaration in set-off, and was admissible for that reason. The promise relied on by the defendant was an original undertaking by the plaintiff and not a promise on his part to pay the debt of another. The item was properly included in the declaration in set-off. The other questions and evidence admitted during the plaintiff's cross-examination subject to his exception were admissible as bearing upon the first two items in the declaration in set-off, though subsequently rendered almost if not wholly immaterial by the ruling in the plaintiff's favor upon those items.

Some of the remaining exceptions relate to the admission and exclusion of other evidence. The question, "The case in Westfield was decided in your favor, wasn't it?", put to the defendant on cross-examination, related to matter that was wholly immaterial and was rightly excluded. The testimony as to the loss of the book was rightly admitted as tending to contradict the plaintiff and affect his credibility. The testimony in regard to the number of logs and amount of lumber cut on the "Stowe lot" bore directly on the first two items in the declaration in set-off, though, as already observed in regard to other evidence, rendered immaterial by the subsequent ruling in the plaintiff's favor.

The items of cash credited to the plaintiff in the declaration in set-off were expressly credited to him on account of what was alleged to be due from him to the defendant under the first two

* It appears from the transcript of the testimony, but not in the bill of exceptions, that the pleadings here referred to were those in the suit of Eastman and Maxwell against the defendant. The question and answer just preceding this one were: "Q. Now, when Maxwell and Eastman brought a suit against Loomis, do you remember when that was?" A. "I think I looked up the pleadings the other day. . . ."

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items for labor on the "Stowe lot," and the testimony showed that the amounts thus credited were so paid by the plaintiff to the defendant. There was nothing to show that the plaintiff had overpaid the defendant or that there was any mistake on the plaintiff's part, and consequently there was nothing to show that the plaintiff was entitled to have any part of the cash so paid credited to or allowed him on the item for costs and expenses.

Even if we assume in the plaintiff's favor but without so deciding that his exception to the overruling of his motion for a new trial raises a question of law and that the overruling of the motion was not an exercise by the judge of his discretion, no error is shown. There was clearly evidence warranting the verdict, and, for aught that appears, the judge may not have been satisfied that the plaintiff had exercised due diligence in regard to the alleged matter of newly discovered evidence. Moreover the evidence was cumulative. Nothing appears to show that the court wrongly exercised its discretion, if the matter was one of discretion.

Exceptions overruled.

COMMONWEALTH *vs.* WILFORD A. BAILEY.

Worcester. September 28, 1908. October 20, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Pleading, Criminal, Indictment, Motion to quash. *Uttering Forged Instrument.*

Under R. L. c. 218, § 67, setting forth sufficient forms of indictment, an indictment charging, that the defendant on a certain day "with intent to injure and defraud did utter and publish as true a certain forged instrument purporting to be a promissory note well knowing the same to be forged," sufficiently informs the defendant of the nature of the offense with which he is charged. If he needs further particulars to enable him to prepare his defense, R. L. c. 218, § 39, gives him a right to them.

Where it appears by the bill of exceptions in a criminal case, that the defendant entered a plea of not guilty, and, before the empanelling of the jury, filed a motion to quash the indictment, if no objection appears to have been made to the filing of the motion after the defendant had pleaded to the indictment, the motion will be regarded as having been filed properly by leave of court.

MORTON, J. This is an indictment charging that the defendant "with intent to injure and defraud did utter and publish as

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true a certain forged instrument purporting to be a promissory note well knowing the same to be forged." The indictment contains two counts, charging the same offense on two different dates. The defendant entered a plea of not guilty, and, before the empanelling of the jury, filed a motion to quash "for want of sufficient allegations in form and substance," and because the indictment did not set out in either count "the instrument or instruments alleged to have been forged" or "the tenor or substance of said alleged forged instrument or instruments or either of them." The motion to quash was denied and the defendant excepted. The jury found the defendant guilty upon the first count, and not guilty upon the second.

The statutory form of indictment for forgery is as follows: "That A. B., with intent to injure and defraud, did forge a certain instrument purporting to be, etc. (give the name of the instrument, description, tenor or substance as the pleader chooses)." And the statutory form for uttering is, "That A. B., with intent to injure and defraud, did utter and publish as true a certain forged instrument (describe as in forgery), well knowing the same to be forged." R. L. c. 218, § 67.

The defendant contends that the statute requires that the indictment should set forth the name of the instrument and its description, and, in addition, either the tenor or substance of the instrument. In other words he contends that the statute should be construed as if it read "give the name of the instrument and its description, and its tenor or substance as the pleader chooses," limiting the choice of the pleader to the setting out of the "tenor or substance." Manifestly the grammatical structure of the phrase does not require or warrant this construction. The phrase is disjunctive and not conjunctive. There is nothing in it which limits the choice of the pleader to the tenor or substance of the instrument. On the contrary he may give "the name of the instrument, description, tenor or substance," one or more, as he chooses. The object of the statute was and is to simplify indictments without interfering with the constitutional rights of the accused. But if the construction contended for by the defendant is to prevail, indictments for forgery will be less simple than they were before. It has been held that, "It is sufficient if it appears on the face of the indictment by proper averments that

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the instrument forged is of the particular kind prohibited by statute. Or, if it can be collected from the forged writing itself as set out in the indictment that it assumes to be an instrument the false making of which is forgery." *Commonwealth* v. *Castles*, 9 Gray, 121. According to this an indictment for forgery would be sufficient if it contained such averments in regard to the forged writing either by setting out the forged writing itself or by a description of it or otherwise as would enable the court to see that the instrument was one in regard to which the crime of forgery could be committed. But if the construction of the statute contended for by the defendant is to be followed it would be necessary, not only to give the name of the instrument and a description of it, but also either its tenor or substance, thus imposing upon the pleader a greater burden instead of a less, without any corresponding advantage to the accused. We do not think that the construction contended for is the correct construction. The description of the forged writing as an instrument purporting to be a promissory note sufficiently informed the accused of the nature of the offense with which he was charged. If he needed more particulars to enable him to prepare his defense, the statute gave him the right to such additional particulars as would enable him to fully understand the charge, and his rights were thus fully protected. R. L. c. 218, § 89. *Commonwealth* v. *Snell*, 189 Mass. 12. *Commonwealth* v. *Sinclair*, 195 Mass. 100. The instrument was properly named or described as an instrument purporting to be a promissory note. See *United States* v. *Howell*, 11 Wall. 432, 437; Precedents of Indictments, Train & Heard, (1st ed.) 214, 223, *et seq.* The indictment follows the statutory form, and the motion to quash was, we think, rightly overruled.

Although the motion to quash was not filed till after the defendant had entered a plea of not guilty, no objection appears to have been made, and the motion must be regarded, therefore, as having been properly filed by leave of court.

Exceptions overruled.

H. Parker, for the defendant.

E. I. Morgan, Assistant District Attorney, for the Commonwealth.

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ALFRED KAWCABANY *vs.* BOSTON AND MAINE RAILROAD.

Worcester. September 28, 1908. — October 20, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Carrier, Of goods. *Lien. Railroad.*

A railroad corporation may make a charge of fifteen cents for transporting a pedler's pack which a passenger attempts to take as personal baggage, and may refuse to deliver the pack to the passenger on his refusing to pay this charge for its transportation, and, after a reasonable time, which in this case was twenty-four hours, the corporation also may charge for storage, and has a lien on the pack for the charges both for transportation and storage.

TORT with a first count for the alleged conversion of a pedler's pack belonging to the plaintiff, and a second and a third count each alleging the defendant's receipt of the pack as a common carrier and its failure to deliver the pack. Writ dated August 7, 1907.

In the Superior Court the case was tried before *Gaskill*, J. The evidence tended to show that the plaintiff's agent, one Assam, bought a ticket at Jefferson, Massachusetts, for Coldbrook, Massachusetts, on the defendant's road in the afternoon of June 20, 1907, and had with him a pedler's pack containing merchandise belonging to the plaintiff which was to be delivered at a small village near Coldbrook. Assam boarded the train at Jefferson and was told by the defendant's servants that the pack would have to be carried in the baggage car. There was a notice posted at the station at Jefferson that pedlers' packs would be subject to a charge of fifteen cents excess baggage charge. The train reached Coldbrook and stopped for a period not exceeding two minutes. Assam alighted from the car and asked for his pack, and the defendant's agent told him that he could have it when he paid fifteen cents for it. The pack was not taken from the train. The plaintiff did not offer to pay the fifteen cents. The pack then was carried to Barre, a station a mile and a half farther on, and the plaintiff's agent was not then notified where it had gone. The pack never was brought to Coldbrook station but was kept at Barre for a long time and storage charges at the rate of ten cents per day, after the first

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day, were assessed on it. The class of goods to which the pack belonged was classified by the defendant as baggage on which an excess rate was charged. There was a rule of the defendant that there would be no charge for storage on baggage of this kind for the first twenty-four hours after the arrival at its destination. There was a baggage room used to deposit and keep baggage at Coldbrook station.

The plaintiff's agent, Assam, testified in part as follows: That he returned to Coldbrook station the next morning, demanded his pack and offered to the defendant's agent the fifteen cents claimed to be due; that the defendant's agent told him that he did not know where the pack was and that he would have to write to Boston for it; that the witness did not see the pack again for some weeks and then saw it at the Barre station where the agent told him that there was the sum of $2 due on it.

The defendant's agent, the station master at Coldbrook, testified that the plaintiff's agent, Assam, when he got off the train demanded his baggage but absolutely refused to pay the fifteen cents; that the baggage was carried away and that Assam returned to the station the next afternoon, within twenty-four hours, and after inquiring for his baggage was asked if he was willing to pay the fifteen cents; that he then again absolutely refused to pay the fifteen cents; that the agent told him that the pack was at Barre and that he could have it later if he would pay the fifteen cents, as he would have it brought to him by the next train from Barre, but Assam said that he would not pay the fifteen cents.

Another agent of the defendant, the station master at Barre, testified in part, that the plaintiff's agent, Assam, called at Barre about sixteen days after June 20, and asked about the pack, that he showed it to him and told him that he would have to pay about $1.60 to get it; that he asked him if he wanted it and that Assam said "No."

At the close of all the evidence the plaintiff asked the judge to direct a verdict for the plaintiff. This the judge refused to do, and the plaintiff excepted.

The judge instructed the jury as follows: "Mr. Foreman and gentlemen of the jury: The plaintiff in three different ways in his declaration alleges that he has a cause of action against the

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defendant. Each one of those ways relates to the same subject matter. It is not three suits but three ways of stating one cause of action. Practically it comes down to this: that the plaintiff delivered to the defendant certain goods to be transported from Jefferson to Coldbrook; that there was a charge due as excess baggage upon that baggage and that at Coldbrook the plaintiff's agent at first refused to pay any of this excess baggage charge, but that at a later time at various times he tendered to the defendant the amount due for carrying the baggage and demanded it of the carrier, but it utterly refused to deliver the same to the plaintiff.

"As I take it the law is plain and easily stated. First, there is no dispute that these goods were delivered by the plaintiff to the defendant company to be transported; that they were not technically personal baggage, but by the rules of the company this being a pedler's pack was regarded as excess baggage, and in the station at Coldbrook in plain view a notice to that effect was posted.

"I instruct you as a matter of law that the defendant company had the right to charge as excess baggage the rate which it had fixed at fifteen cents, no question being made but that that was a reasonable sum. So far, then, practically there is no dispute. What next? Well, the next thing is, the defendant having taken those goods for something to be paid for transporting them, it was the duty of the defendant to deliver those goods at the place to which the passenger was going upon the request of the plaintiff's agent and payment of the amount due. Now, you are on the line to Coldbrook, and what is the situation there? And that is as you may find upon the evidence. Upon one side it is contended in behalf of the plaintiff that he there asked for the goods to be delivered, that the defendant's agent stated that there was fifteen cents due, and that he refused to pay that fifteen cents. So far there is no dispute. So up to that time and with that refusal the company was justified, up to that point. Now a rule of the company has been put in, or custom of the company, testified to by one of its agents, that for twenty-four hours after the receipt of goods where there is a charge for excess baggage, they retain those goods without additional charge.

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"Now, dealing with that problem; up to this time there is nothing that the defendant has done that is not justifiable. Now, what is the next step? What was done within the next twenty-four hours? Well, at the beginning of that twenty-four hours those goods were not delivered at the station at Coldbrook but were carried on to Barre. That in and of itself was an unjustifiable act on the part of the defendant, but that does not mean that with that alone the plaintiff can recover.

"Now, what was done upon the following day? If there was a refusal at all times on the part of this plaintiff to pay reasonable charges, then it is practically immaterial where these goods were, whether with the agent at Coldbrook or whether they were at Barre, because there was no obligation to deliver unless upon payment or offer of payment, so that eliminates that for the time being. Now, the only way in which the plaintiff can recover here is that you must be satisfied by a fair preponderance of the evidence of one of two things, either that within twenty-four hours after the arrival of the plaintiff's pack at Coldbrook he tendered or offered to pay to the station agent there fifteen cents, and it is admitted of course the goods were not at the station. Now, unless that is so, then there is no ground whatever, because it is admitted by the plaintiff that at Barre when the plaintiff's agent went there he simply asked how much the charges were, and as he said $2.80, but as the agent says $1.60, and the plaintiff's agent refused to pay it. So that that becomes immaterial in a way.

"Now, if the plaintiff's agent within twenty-four hours after about six P. M. of that evening came to the agent at Coldbrook and offered to pay fifteen cents then it was the duty of the defendant to deliver, at Coldbrook or at any other place which the plaintiff might require if the defendant consented, those goods.

"Well, the goods were not at Coldbrook. That is admitted. The station agent testifies that he said to the plaintiff's agent as long as you are going back if you prefer I will have those goods at Jefferson for you or I will deliver them to you here if you prefer. If that was what was said then even though the offer was made, of course as I have told you there can be no recovery unless you are satisfied the plaintiff's agent did offer

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to pay within twenty-four hours thereafter of six P. M. of that day the fifteen cents.

"If he did offer to pay it then if there was the offer made by the defendant's agent to have those goods at Coldbrook or if the plaintiff's agent preferred at Jefferson, and there was a refusal on the part of the plaintiff then no recovery can be had.

"To put it perhaps in a little more simple way, and in a sentence, practically this is the only way in which the plaintiff can recover, for you to be satisfied that within twenty-four hours after six P. M. of that given day the plaintiff's agent offered to pay the station agent at Coldbrook fifteen cents, and the station agent at Coldbrook did not have the goods and could not deliver the goods, and did not know where the goods were and so refused. If that is the situation the plaintiff may recover, otherwise not.

"If you come to question of damages, the plaintiff has testified that he paid fifty dollars for this property, and that he expected to make twenty or twenty-five per cent, and as I recall the plaintiff's testimony upon the stand he said that in his judgment these goods were worth from seventy to seventy-five dollars.

"You are to take the evidence, gentlemen, and if you find for the plaintiff for the value of the goods you will add interest from the date of the writ at six per cent. The date of the writ was the seventh day of last August."

The plaintiff excepted to that portion of the charge beginning "If he did offer to pay" and ending with words "otherwise not."

The judge added, "If the testimony of the agent was that he offered to have the goods back on the next train, if that was what was done, that was reasonable time." The plaintiff excepted to this last instruction.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

H. H. Lepper, for the plaintiff, submitted a brief.

C. M. Thayer, for the defendant.

SHELDON, J. It is not denied that the defendant had a right to make the charge of fifteen cents for the transportation of the plaintiff's pack, or that it had the right to detain the pack when

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the plaintiff's agent refused to pay this amount. The defendant had a lien on the pack both for the charge of transportation and for storage after a reasonable time. *Miller* v. *Mansfield*, 112 Mass. 260. It was not disputed that under the defendant's rule in this case twenty-four hours constituted such reasonable time. Accordingly a verdict could not have been ordered for the plaintiff.

Nor has the plaintiff any right to complain of the instructions given to the jury. His only contention was that the defendant had converted his goods at Coldbrook, by refusing to deliver them to his agent on demand. But, as we have seen already, the defendant had a right to refuse to deliver them on their arrival at Coldbrook without payment of its charges, and taking the whole of the judge's charge together, the jury could not have returned a verdict for the defendant if they had found that the plaintiff's agent did, as he testified, within twenty-four hours of that time offer at Coldbrook to pay the charge for transporting the goods. It is not necessary to determine whether the judge was right in ruling that an offer by the defendant to deliver the goods on the arrival of the next train from Barre would be sufficient, though we do not mean to intimate any doubt as to the correctness of this ruling.

Exceptions overruled.

JAMES POWERS *vs.* WYMAN AND GORDON COMPANY.

Worcester. September 28, 1908. — October 20, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Negligence, Employer's liability.

The proprietor of a factory or machine shop owes no duty to a laborer employed to work there to change or improve any of the obvious conditions of his workshop or machinery. The laborer accepts them as they are at the time of his employment.

If a laborer employed in a workshop, where there is a steam trip hammer which is set in motion by pressing down a pedal extending in front of and around two sides of the base, on the second day of his employment, being ignorant of the existence of the pedal, is told by a person, who may be acting as a superintendent, to go with a loaded wheelbarrow between the trip hammer and a pile of dies two or three feet high, where there is a space "just wide enough to

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wiggle the barrow through," and if in attempting to do this the laborer strikes the pile of dies and is thrown down, and in some way his foot comes down on the pedal and sets the machine in motion and the hammer comes down and cuts off one of his fingers, he cannot recover from his employer for this injury, which happened by a pure mischance for which no one was liable and which could not reasonably have been anticipated either by the employer or his superintendent, who therefore were guilty of no negligence in failing to warn or instruct the laborer in regard to such a danger.

MORTON, J. This is an action of tort to recover for personal injuries received by the plaintiff while employed as a laborer in the defendant's works at Worcester. The declaration is in four counts: the first, for failure to give the plaintiff sufficient instructions; the second, for a defect in the ways, works and machinery which was not discovered because of the negligence of the defendant, or of that of some person entrusted by it with the duty of seeing that the ways, works and machinery were in proper condition; the third, for the negligence of a superintendent; and the fourth for failure on the part of the defendant to furnish suitable machinery and appliances for the proper prosecution of his work by the plaintiff, and to keep the same in repair. At the close of the evidence the judge on the defendant's motion ordered a verdict for the defendant, and the case is here on the plaintiff's exceptions to that ruling. At the argument in this court the fourth count was waived.

The plaintiff applied for work at the office of the defendant, and after some conversation with the master mechanic, who had authority to hire help, was taken by him to the superintendent with directions to the latter to set the plaintiff at work. The superintendent took him to a man who is spoken of in the exceptions as the "tall Swede," and told him to set the plaintiff at work, and told the plaintiff to do as the Swede told him to do. The Swede directed him "to go with a Polander and carry crank shafts from the large furnace to the trip hammer." The trip hammer was a steam hammer operated by means of a pedal extending in front of and round two sides of the base. When the operator desired to start the machine he pressed down on the pedal. This would let the steam on and set the hammer in motion, and it would continue in motion as long as the pedal was kept pressed down. The crank shafts were placed by the Polander under the hammer, and when hammered sufficiently were

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removed by him and the plaintiff and taken by them to the blacksmith, where they would leave them and then proceed to the furnace and get another crank shaft and repeat the previous operation. The plaintiff was hired about one o'clock and did this work for the rest of the day. Across the passageway at one side of the trip hammer was a pile of dies seven or eight feet long and two or three feet high. The next day the plaintiff went to work about seven o'clock, and the Swede set him to doing something which took about ten minutes. The Swede then told him to get a wheelbarrow and go over to a pile of crank shafts across from the blacksmith's table where the Polander was at work, and do as the Polander told him. He went over and the Polander told him to put three crank shafts on his wheelbarrow and take them to the machine shop. There were two ways to the machine shop, and when the plaintiff had got his wheelbarrow loaded he saw that one of the ways, and perhaps the more direct one, was blocked by a coal team. He asked the Polander if he should wait, and the Polander said, "No, go down there," pointing to the other way which went between the trip hammer and the pile of dies. "The space," as the plaintiff testified, "between the machine and the pile of dies was just wide enough to wiggle the barrow through," and from his account on his direct and cross examination of the way in which the accident happened it appears that while "wiggling through" he struck the pile of dies and was thrown down and in some way his foot came down on the pedal and set the machine in motion and the hammer came down and cut off one of his fingers.

It is obvious, we think, from this statement of the facts that the accident was one for which the defendant was in no way liable. The conditions as to the machine and the way along which the plaintiff was told to go were the same at the time of the accident that they were when he entered the defendant's employment, and the defendant owed him no duty to change them. The plaintiff testified that he had not seen the pedal, and did not know how it worked, or that the machine was operated by a pedal. Considering that he had worked about the machine for half a day, and was twenty-six years old, and, so far as appears, of average intelligence, this seems incredible.

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But assuming, as we are bound to do, that a jury might believe him, it does not affect the defendant's liability. For aught that appears the way, although narrow, was safe enough, except for such an accident as happened, and neither the defendant nor its superintendent nor the Polander (assuming that the latter was for the moment a sort of superintendent) had any reason to anticipate such an accident as occurred, and were, therefore, not guilty of any negligence in failing to warn or instruct the plaintiff. What happened was a pure mischance for which no one was liable. *Craven* v. *Mayers*, 165 Mass. 271. *McLean* v. *Cole*, 175 Mass. 5.

Exceptions overruled.

E. J. Melanefy, for the plaintiff.
C. C. Milton, for the defendant.

TOUSSAINT BOISVERT *vs.* EDWARD D. WARD.

Worcester. September 28, 1908. — October 20, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Negligence, Employer's liability. *Practice, Civil*, Exceptions, Order of evidence. *Evidence*, Opinion: experts.

If a journeyman carpenter of twenty years' experience applies for work to a contractor who is engaged in tearing down the roof of an old building to make room for a new structure, the carpenter having never before worked at tearing down a roof but this fact being unknown to the contractor, and is set to work at once on the roof, being given an iron bar and told to rip off the boards and throw them in a certain place and then to take down the rafters, and if while proceeding about this work in his own way he steps on a rafter which proves to be rotten and breaks, and he falls through the roof and is injured, and if it appears that the rafters were painted on the sides and bottom so that the natural wood could be seen only as the boards were taken off the top, and that the place where the rafter broke was exposed by other workmen who had preceded this carpenter in the work and was open to sight, the carpenter cannot recover from his employer for his injuries, he having assumed the risk of such an accident when he entered the employ of the contractor to assist in tearing down the old roof.

An exception to the exclusion of a question to a witness cannot be sustained unless it appears by the bill of exceptions that the answer to the question would have been material and that the excepting party has suffered injury by its exclusion.

The order in which the evidence at a trial shall be admitted is within the discretion of the presiding judge and a ruling in regard to it is not the subject of exception.

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The exclusion of a question to a witness is not the subject of exception if the next question put to the witness was in substance the same and was allowed to be answered.

In an action by a carpenter employed by a contractor to assist in tearing down an old roof, for personal injuries from a fall caused by the plaintiff stepping on one of the rafters of the old roof which proved to be rotten, an expert witness, who has described the building and the roof, cannot be asked whether he "would have reason to expect that there may have been leaks in that roof or some part of it," it being a matter of common knowledge that old roofs are likely to leak and that the natural result of water leaking through a roof is to produce decay.

In an action by a carpenter employed by a contractor to assist in tearing down an old roof, for personal injuries from a fall caused by the plaintiff stepping on one of the rafters of the old roof which proved to be rotten, an expert witness, after the attendant conditions of the accident have been shown, cannot be asked whether in his opinion the plaintiff "was proceeding in the usual and ordinary way to do" his work, this, in the case of work so simple in its character, being a question for the jury, who are to pass upon the issue whether the plaintiff was using ordinary care, and in doing so are to determine what common prudence required under the circumstances.

TORT for personal injuries incurred on December 28, 1906, while in the employ of the defendant from falling through the roof of a building by reason of the breaking of a rotten rafter on which the plaintiff stepped in the course of his work. Writ dated January 19, 1907.

In the Superior Court the case was tried before *King*, J. The facts which appeared by the plaintiff's evidence are stated in the opinion. The defendant offered no evidence, and asked the judge to rule that there was not sufficient evidence to warrant a finding for the plaintiff. The judge so ruled, and ordered a verdict for the defendant. The plaintiff alleged exceptions, including certain exceptions to the exclusion of evidence which are described in the opinion.

M. M. Taylor, (*V. E. Runo* with him,) for the plaintiff.

C. C. Milton, for the defendant, was not called upon.

RUGG, J. The plaintiff was a carpenter with an experience of about twenty years. Although he had never before worked at tearing down a roof, it does not appear that he gave this information to the defendant when getting employment with him for the first time on the day of the accident. He was apparently hired on the footing of his experience as a journeyman carpenter, and set at work in tearing the boards off the roof of a building, which was being demolished to make way for a new structure. He was given an iron bar and told to rip off the boards and to

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throw them in a certain place, and then to take down the rafters. After loosening a considerable number of boards and while trying to lay across the rafters some boards, upon which to walk while carrying the rest to the place of deposit, one of the rafters broke, and he received injuries, for which he seeks compensation in this action. The place where the rafter broke was exposed by the loosening of the boards by other workmen who had preceded the plaintiff in the service, but it was open to sight, and as the plaintiff progressed in his work more and more of several rafters became exposed to view. The rafters were painted on the sides and bottom, so that the natural wood could be seen only as the boards were taken off from the top. Examination after the accident revealed the fact that the rafter, which broke, and whose dimensions were two inches wide by seven inches thick, was rotten for a length of eight inches to a foot, and for a depth of about one and a half or two inches. The defendant built the roof ten or eleven years before the accident partly of old and partly of new material, and had used it as a platform in the construction of another building for about two weeks immediately before the plaintiff's employment, but made no other test to determine its strength. It did not appear that the defendant or his servants had any particular knowledge of the weakness of the rafter, and the plaintiff was given no warning respecting it, other than that which might be inferred from being put at work in tearing down an old roof.

1. The verdict for the defendant was rightly directed. The plaintiff was an experienced carpenter. As such he was charged with knowledge of the ordinary attributes of wood and timber and the usual characteristics of roofs. He knew or ought to have known, as well as any one, that rafters are liable to decay with age and possible exposure to moisture. The breaking of a board or rafter was one of the common risks of the employment. In the absence of knowledge on the part of the defendant or his agents, of the particular weakness which caused the harm, no warning could have conveyed to the plaintiff any information beyond that which as a journeyman carpenter he already possessed. He neither asked for nor received any special instruction as to how to perform his work. He was left to do it in his own way. He testified that the upper surface of the rafter, which

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broke, was open and exposed to view, and he could see it. The decayed place, although perhaps not discernible to the eye, was as obvious to him as to anybody, and its nature could be as easily understood by him as by any one. The necessity of inspection to assure himself of the strength of his footing was one, which bore upon him, with the opportunity before him, at least as hard as upon his absent employer. A roof in process of destruction is not a place where permanent and firm conditions prevail, but where decay and disintegration are to be apprehended, and reasonable precautions to avoid peril must be taken by the workmen from time to time with the shifting state of the operations. The risk of a breaking piece of wood and the duty of avoiding danger from such a cause must be held to have been assumed by the plaintiff when he entered the employment. *Sampson* v. *Holbrook*, 192 Mass. 421. *Lavelle* v. *Dunn-Green Leather Co.* 194 Mass. 294. *Beique* v. *Hosmer*, 169 Mass. 541. *Gillette* v. *General Electric Co.* 187 Mass. 1.

2. It is perhaps enough to say, as to all the exceptions saved to the exclusion of interrogatories, that the plaintiff, having made no offer of proof, does not show that he has suffered any injury. *Cook* v. *Enterprise Transportation Co.* 197 Mass. 7. But if all assumptions be made in his favor in this regard, his exceptions cannot be sustained. During the examination in chief of the defendant, who was called as a witness by the plaintiff, he was asked in what way he "could test a building of this general character before" taking it down. Upon objection being made, the judge ruled saying, "for the present I will exclude the question." It does not appear that at this stage of the case any evidence of the breaking of the rafter had been introduced, and the ruling may have been merely a discretionary direction of the conduct of the trial, and therefore not open to exception. But the next question put was in substance the same, and was allowed to be answered. On this account the plaintiff does not show that he suffered any harm by the earlier ruling. The inquiry was made of an expert witness describing the building and roof, whether he "would have reason to expect that there may have been leaks in that roof or some part of it." It is matter of common knowledge that roofs are liable to leak, and that the natural result of water leaking through a roof is to produce decay, and

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therefore it is not a proper subject for expert testimony. The roof having been fully described, the jury was as competent to draw reasonable inferences from its condition as any one. The same witness was asked whether, in his opinion, the plaintiff was "proceeding in the usual and ordinary way to do" his work. The work was on the whole simple in its character, and all the attendant conditions being shown, it was for the jury to say whether the plaintiff was using ordinary care. In passing upon this issue they were able to determine what common prudence required without the aid of opinion evidence. *Whalen* v. *Rosnosky*, 195 Mass. 545.

Exceptions overruled.

ELLEN M. HOWE & others *vs.* FRANK E. HOWE.

Worcester. September 28, 1908. — October 20, 1908.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Trust, Resulting. *Equity Pleading and Practice*, Memorandum of judge, Parties, Costs. *Frauds, Statute of. Evidence*, Admissions by conduct. *Equity Jurisdiction*, Laches, Estoppel.

A bill in equity by an executrix, seeking to establish a resulting trust in certain real estate in favor of the plaintiff's testator, averred that at the time of the purchase of the real estate in question the entire purchase money was paid by the plaintiff's testator, who thereafter until his death occupied the real estate and received all the rents and profits, that the conveyance was made to one M., who never occupied or used the premises or received any benefit therefrom and who held the title for the benefit of the plaintiff's testator and thereafter at his request conveyed the real estate to one W. H. without consideration, it being understood and agreed between the plaintiff's testator and W. H. that the latter was holding the title for the benefit of the former, and that later, at the request of the plaintiff's testator, W. H. conveyed the premises without consideration to the defendant, the son of the plaintiff's testator, who never occupied the premises or received any income or rent from them but held the legal title for the use and benefit of his father, the plaintiff's testator, as M. and W. H. had done previously. *Held*, that these allegations sufficiently stated a resulting trust.

Where one buys and pays for real estate but the title is conveyed to another, a trust results in favor of him who pays the purchase money, even if he has borrowed the money for the purpose from the grantee.

On an appeal to this court from a decree in equity a memorandum of decision of the judge who made the decree, although filed by the judge voluntarily without the request of either party, stands on the same footing as a report of findings of fact made under R. L. c. 159, § 23, and the decision reported in such a memorandum will not be set aside unless plainly wrong.

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Where a resulting trust is created by the payment of the purchase money for real estate, the title to which is taken in the name of another, the trust does not lose its character by the transfer of the title by the trustee to another person who takes with notice of the trust. Such a conveyance, which merely substitutes one trustee for another, requires no consideration to support it.

The statute of frauds does not prevent the establishment of a resulting trust by proving by oral evidence that the purchase money for real estate was paid by a person other than the one in whose name the title was taken. Nor is there anything in the statute of frauds which requires any writing to continue the existence of such a trust when a new trustee is selected to whom the property is conveyed with notice of the trust.

In a suit in equity where it is incumbent on the plaintiff to show that the defendant accepted a certain conveyance of real estate with notice of a resulting trust in favor of the plaintiff's testator, where there is testimony tending to show a recognition of the obligation of the trust on the part of the defendant, which however is to be treated with caution and discrimination on account of the interest of the witnesses, if the defendant is in court and fails to testify personally or to call any witnesses in his behalf, such omission to offer evidence within his reach to control or explain the evidence for the plaintiff on this issue may be regarded as conduct in the nature of an admission which may be given consideration.

If a conveyance of real estate, already subject to a resulting trust, made without consideration to the son of the beneficial owner, creates any presumption that it was made as a gift to the son in token of parental affection, and was not conveyed to him to hold as trustee for his father, the inference is merely one which the law permits to be drawn from unexplained facts, and may be overcome by evidence showing the real situation to be otherwise; and where the son to whom the conveyance is made is of middle age and is in business on his own account, and the beneficial owner also has a wife and other sons, one of them barely of age, the presumption is very weak, even when not rebutted, as in the present case, by evidence tending to show that the son took title with express notice of the trust and for the purpose of holding the property for the benefit of his father.

The beneficiary of a resulting trust in real estate, determinable at his pleasure, who has enjoyed the benefits of the trust during his life without exercising his right to bring the trust to an end, is guilty of no laches in failing to terminate the trust, and the executor of his will is free to bring a suit in equity to establish the trust.

One who received a conveyance of real estate subject to a resulting trust, and after acting for a time as trustee conveyed the real estate to a new trustee to act in his stead, and who afterwards upon the death of the beneficiary became himself one of the beneficiaries of the trust, is in no way estopped from joining as one of the plaintiffs in a suit in equity to establish the resulting trust against the person to whom he conveyed the property as trustee.

On affirming a decree of the Superior Court on appeal, it was ordered that the decree should be modified to include the costs of the appeal to this court and as modified should be affirmed.

RUGG, J. This is a suit in equity by the widow, who is also the executrix of the will, of Elbridge G. Howe, and the other plaintiffs, who are devisees of interests in the real estate of said

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Elbridge against the defendant, who is a son of said Elbridge, seeking to establish a resulting trust in their favor in certain real estate the legal title to which was in the defendant. No appeal was taken from the order overruling the defendant's demurrer, so that no question raised by it is before us. There was a hearing before a judge of the Superior Court, who filed a memorandum of facts found by him and entered a decree establishing the trust, from which the defendant appealed. The defendant presented forty prayers for rulings, all of which were refused, as either immaterial in view of the findings made or unsound in law. A considerable number of these have not been argued, and are treated as waived.

It first is argued that the bill of complaint contains no sufficient allegation of a resulting trust, and hence that the decree is not within the scope of the bill. It is distinctly averred that, at the time of the purchase of the real estate in question, the entire consideration was paid by Elbridge G. Howe, who had always thereafter until his death occupied and received all the rents and profits, and that the conveyance was made to one Mowry, who never occupied or used the premises or received any benefit therefrom, who held the title for the benefit of Elbridge G. Howe, and who thereafter at his request conveyed the estate to Walter H. Howe without consideration, it being understood and agreed between Elbridge G. and Walter H. Howe that the latter was holding the title for the use and benefit of the former, as Mowry had done; and that later, at the request of Elbridge G. Howe, said Walter H. conveyed the premises without consideration to the defendant, who never occupied or received any of the income or rent from them, but who held the legal title for the use and benefit of his father as said Mowry and Walter H. had done. This is in substance an averment of an initial purchase by the father, who paid the consideration, and subsequent conveyance by Mowry to Walter H. and by him to Frank E. with notice of the circumstances of the original transaction and assent to its terms. These allegations sufficiently state a resulting trust within the well recognized principle of equity jurisprudence, that where one buys and pays for real estate, but the conveyance of the title is to another, a trust results in favor of the one who pays the consideration, which may be enforced in

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equity against the grantee named in the deed, who is treated as subject to all the obligations of a trustee. *Lufkin* v. *Jakeman*, 188 Mass. 528. *Skehill* v. *Abbott*, 184 Mass. 145. *Cogswell* v. *Hall*, 185 Mass. 455. Such a trust may be established by parol, and the statute of frauds does not apply to such transactions. *Livermore* v. *Aldrich*, 5 Cush. 431. R. L. c. 147, § 1. Nor is it of any consequence that the consideration paid was not out of funds on hand by the original *cestui que trust* but from the proceeds of money borrowed by him even from the trustee, provided the fact of the loan is clear. *McDonough* v. *O'Niel*, 113 Mass. 92.

It next is argued that there was not sufficient evidence to warrant the finding stated in the memorandum that the money paid as consideration for the deed from Hayward to Mowry, though in large part received from Mowry, was in fact the money of Elbridge G. Howe. The memorandum, although apparently filed voluntarily and without the request of either party, stands on the same footing as a report of findings of fact made under R. L. c. 159, § 23, and will not be set aside unless plainly wrong. *Cohen* v. *Nagle*, 190 Mass. 4. The evidence upon this point, although not as full as might have been desired, cannot be said to be too slender to sustain the finding of the trial judge, who saw the witnesses and heard their oral testimony, and was able better to weigh its effect than an appellate tribunal which can only read its transcript. The real estate in question was a farm, upon which Elbridge G. Howe had been living for many years before the first deed here in question, and on which he continued to reside until his death. A mortgage upon this farm had been foreclosed, and Elbridge G. Howe then sought out one Stockwell, and placed before him the situation and his circumstances, and told him "he had got to raise some money to redeem the place." The bargain for the purchase of the property was made by Stockwell acting solely for and in behalf of Elbridge G. Howe. Stockwell was employed apparently in part because of his familiarity with the value of wood and timber, a substantial amount of which was growing on the estate, and put his own personality and perhaps his responsibility to some extent into the transaction, as he made the sale of some if not all of the standing wood and timber and saw to the

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application of the money received from this source to the extent of $1,000 toward the purchase price of the farm, which was $3,000. E. G. Howe stated to Stockwell that he could raise the balance of $2,000, and this came finally in the form of a draft from Mowry. Throughout the negotiations Elbridge G. Howe acted as if he were principal and not agent for Mowry, and he was acting with reference to property, which he had before and was then using as his home. There was no evidence that Mowry ever made any claim that the property was his, and on the other hand there was evidence that he, being a nephew of E. G. Howe, recognized that he held it as trustee for his uncle, and was at all times willing to and did finally make such conveyance as his elder kinsman desired. This was enough to establish the trust between Mowry and E. G. Howe. It is not necessary to discuss the question of the admissibility of certain letters from Mowry to E. G. Howe by reason of the statement in the memorandum that they were not regarded as materially affecting the finding of the main fact that the purchase money was in fact furnished by E. G. Howe.

It further is argued that the subsequent conveyances to Walter H. and Frank E. Howe, successively, were voluntary and that no trust resulted. This argument misconceives the meaning of a voluntary conveyance as applied to this branch of equity. It is true that the resulting trust arises out of the fact that one pays the consideration for the purchase, while the grantee merely takes the naked title. On account of the improbability of a gift to a stranger, the law implies that the one who holds the title, without having paid any value for it, is a trustee for the one who in fact paid the purchase price. Such a trust cannot be implied when the conveyance is voluntary, without the payment of any purchase price. *Fitzgerald* v. *Fitzgerald*, 168 Mass. 488. *Moran* v. *Somes*, 154 Mass. 200. But this principle has no application to a case where the original resulting trust is established, and the first trustee simply transfers the title, subject to the trust, to another trustee, who takes with notice. Such a conveyance is for the mere purpose of relieving one trustee and substituting another, and requires no consideration to support it. The property itself was earlier stamped with the trust and continues its character in the hands of all, who receive it with no-

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tice. This disposes also of the contention based upon *Peirce* v. *Colcord*, 113 Mass. 372, and *Perkins* v. *Perkins*, 181 Mass. 401, 405, and other like cases, that the statute of frauds forbids the maintenance of any action upon such an oral trust. The statute of frauds, as has been pointed out, has no inhibitory effect upon such resulting trust as is here set up. The plaintiffs do not undertake to establish a new trust, springing into being at the time of the conveyances to Walter H. Howe and to the defendant, but assert that the trust originated at the time of the conveyance to Mowry, and that the subsequent conveyances with notice, recognition of and consent to the trust, merely continued the trusteeship in new hands. There is nothing in the statute of frauds, which requires any writing, when a new trustee is selected to administer a pre-existing trust. The only question of difficulty upon this branch of the case is whether the defendant accepted the conveyance to himself with notice of the trust. There was evidence from which this might have been inferred. There were repeated statements to this effect made by E. G. Howe himself. There was testimony tending to show that the defendant had partially if not fully recognized some obligation on his part of a trust nature toward his father and toward some other members of his father's family. This evidence came through interested channels, and is to be treated with caution and discrimination. *Kendall* v. *Mann*, 11 Allen, 15. But there is in the present case the additional significant fact that the defendant, although in court, did not testify himself nor call any witnesses in his behalf. The rule prevails in equity as well as in law that the omission by one party to offer evidence, which may be within his reach, to control or explain evidence given by others, adversely affecting his rights or interests, is a circumstance entitled to consideration. It may be regarded as conduct in the nature of an admission. *McDonough* v. *O'Niel*, 113 Mass. 92. *Whitney* v. *Bayley*, 4 Allen, 173. *Cheney* v. *Gleason*, 125 Mass. 166, 176. *Proctor* v. *Old Colony Railroad*, 154 Mass. 251. It is an attribute of human nature ordinarily to resent an imputation upon one's honor. Extraordinary alertness would be expected to defend against a charge touching one's administration of a trust for the benefit of father and mother. Failure of a party to offer any evidence in such a case gains a corresponding

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importance in finally determining on which side lies the weight of credible evidence.

It also is contended that the fact, that the conveyance to the respondent, although without consideration, was to a son of the beneficial owner, rebuts the presumption of a resulting trust, and is presumed to have been made in token of parental affection. *Whitten* v. *Whitten*, 3 Cush. 191. If it be assumed in favor of the defendant that this presumption may be invoked, where the conveyance to the son was not at the time of the original purchase, but after a resulting trust has been found to exist and at the time of transfer of property already stamped with a trust character, it is not in any event an inflexible presumption. It is an inference which the law draws from unexplained facts, and may be overcome by evidence showing the real situation to be different from that, which would be assumed in the absence of any explanation. *Cooley* v. *Cooley*, 172 Mass. 476. *Peterson* v. *Farnum*, 121 Mass. 476. But in a case like that now under consideration, where the son was of middle age and in business on his own account, and where there are also a wife and other sons, one being a minor or barely of age, the presumption is reduced to its most attenuated form. In view of the evidence already referred to tending to show that the defendant took the title with notice of the existence of the trust, the finding of the judge upon this point clearly was not plainly wrong.

It further is urged that Elbridge G. Howe was in his lifetime guilty of laches in not enforcing the trust. But there is no evidence of laches. He was often requested by members of his family or friends to demand a conveyance from the defendant to some one else, but it does not appear that he ever made such a demand. If for any reason he preferred that the trust persist and the defendant continue to hold the title as trustee, he could do this without impairment of his rights. His action was consistent with the existence of a trust, which he was willing to have last during his life. A *cestui que trust*, who avails himself of the proceeds of the fund, of which he is the beneficiary, according to the terms of a trust determinable at his pleasure, cannot be charged with laches because he does not avail himself of his additional right to bring the trust to an end.

Finally, it is contended that the petitioner, Walter H. Howe,

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is estopped by the covenants of his quitclaim deed of conveyance to the defendant from claiming any resulting trust in the estate. But his conveyance was a mere transfer of the title, which he held confessedly as trustee, to the defendant to continue to hold as trustee in succession. He is not prevented thereby from setting up an independent and subsequently acquired title to the corpus of the trust. Walter H. Howe has now, by the death of his father, acquired a title, as devisee under his will, to the estate held by the defendant and has a right to join in the enforcement of the trust, in which he now holds a beneficial interest, not possessed by him at the time of his deed. *Stearns* v. *Hendersass*, 9 Cush. 497.

The decree is to be so far modified as to include the costs of this appeal in favor of the plaintiffs, and as modified should be affirmed.

So ordered.

The case was submitted on briefs.

J. W. Sheehan & L. Cutting, for the defendant.

A. M. Taft & J. B. Scott, for the plaintiffs.

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AGENCY.

Existence of Relation.

1. If one takes out a policy of fire insurance in response to the solicitation of an insurance agent, this in no way makes the insurance agent the agent of the insured in afterwards procuring the signature of the insured to an agreement in writing purporting to cancel the policy, especially when the agent is acting wholly in the interest of the insurer and against the interest of the assured. *Horn* v. *Dorchester Mutual Fire Ins. Co.* 534.

Scope of Authority or Employment.

2. At the trial of an action of tort for the alleged conversion by the defendant of household furniture of the plaintiff, there was evidence tending to show that, upon default in the conditions of a mortgage of the furniture which the defendant had accepted from the plaintiff's husband to secure a loan of money, and which purported to be but was not signed by the plaintiff and of which she had no knowledge, the defendant gave the mortgage to one whom he testified was a "professional forecloser" who foreclosed most of his mortgages for him. The defendant also testified that all he said to the forecloser was "to collect," but that he would not say that he had not given to him a power of attorney covering such matters; that he supposed that the forecloser "knew what he was doing," and "had a right to do it" and that, relying on that supposition, he was willing to leave the matter to the forecloser to do as he pleased. After the foreclosure, the plaintiff demanded her furniture of the defendant, and he refused to return it. Thereupon, after attempting for six weeks with an attorney's assistance to get possession of it without bringing any action, the plaintiff, still denying her signature to the mortgage, paid to the defendant, under protest, the amount claimed by the defendant to be due thereon, together with costs and expenses, and the furniture was returned to her. *Held*, that findings were warranted that the acts of the forecloser either were within the scope of the authority given to him by the defendant, or were ratified by the defendant, and that the payment of the mortgage by the plaintiff, under the circumstances, did not ratify the mortgage or adopt her signature thereon. *Berry* v. *Ingalls*, 77.

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Admission by officer which was binding upon corporation, see EVIDENCE, 4.
Evidence warranting finding that certain notice was given to corporation by notice addressed to its treasurer, see EVIDENCE, 2.
Procuring by driver of dump cart of assistance of bystander on sidewalk to help repair cart held to be within scope of driver's authority, so that what was done by bystander was as if done by driver, see NEGLIGENCE, 19.
Entry of appearance, unauthorized by instructions, as opposing petition for proving of will, by lawyer as counsel for one who had made compromise arrangement and had agreed not to oppose proving of will, held not to estop client from insisting upon compromise arrangement being carried out, see CONTRACT, 29.
Attorney at law, retained generally by, but not at time acting on behalf of client in any matter, has no authority to receive notice of dissolution of partnership with which client has business dealings, nor are admissions by him tending to show such notice binding upon his client, see ATTORNEY AT LAW, 1, 2.

Ratification.

Acts of "professional foreclosers," engaged "to collect" amount due on note secured by mortgage on household furniture which purported to be given by owner but was given without authority by owner's husband, the "professional foreclosers" having foreclosed the mortgage and taken possession of the furniture, held to have been ratified by mortgagee, see *ante*, 2.

Liability of Principal to Agent.

3. The general rule that in the absence of a special agreement a principal by employing a broker to secure a customer for him does not deprive himself of the right to get a customer personally or through another broker, which has been applied in cases where a real estate broker was employed, applies equally where a note broker is employed to place a loan. *Kimball* v. *Hayes*, 516.
4. In a suit in equity to establish, and have paid from equitable assets, an alleged debt of the defendants to the plaintiff of $50,000 for services in procuring for the defendants a loan of $500,000 under an agreement in writing, or to recover the sum of $50,000 as damages for preventing the plaintiff from obtaining the loan by breaking the contract in taking a loan from another person, it appeared that the defendants desired the loan for the purpose of buying the stock of a certain steamship company, that in order to be of any benefit to the defendants for that purpose the loan would have to be placed before June 1 of the year then current and that this was known to the plaintiff, that on May 2 the agreement in writing was made between the plaintiff and the defendants, which stated that the defendants had "retained" the plaintiff (who was a member of the bar of New York) "to negotiate for them the obtaining of the aforesaid sum of $500,000, and hereby agree to pay to him as and for his services therefor the sum of $50,000, out of the proceeds of said $500,000, but not otherwise, and the . . . [plaintiff] agrees to accept the same in payment therefor." In an-

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ticipation of this contract, the plaintiff in March had opened negotiations with a certain trust company for a loan of $500,000 to the defendants. After the making of the contract, he continued his efforts to procure the loan from the trust company, with the result that the matter was to be reported upon at a meeting of the executive committee of the trust company to be held on May 29. On or before that day the defendants accepted another offer of a loan of $325,000. Before one o'clock on May 29 one of the defendants, acting for all of them, asked the plaintiff by telephone whether he had received any word from the trust company. To this the plaintiff answered that he had not, that the matter was to come up at four o'clock on that afternoon. The defendant, acting for all the defendants, then replied that he had decided to accept another offer. The contract contained no express provision that the employment of the plaintiff to procure the loan was to be exclusive. *Held*, that the plaintiff was employed as a broker and that there was nothing to take the contract out of the general rule that in the absence of a special agreement a principal by employing a broker does not deprive himself of the right to get a customer personally or through another broker; and that, even if the general rule were that as a matter of implication a broker has a reasonable time in which his right to find a customer is exclusive of other brokers and of his principal, a provision that the plaintiff was to have such an exclusive right until and including May 29 could not have been implied in the present case; therefore, that the defendants in obtaining the necessary money elsewhere violated no duty which they owed to the plaintiff, and that the bill must be dismissed. *Kimball* v. *Hayes*, 516.

Employer's Liability.

See NEGLIGENCE, 2–11.

Notice to employee, under R. L. c. 106, § 75, alleging negligence of employer, includes not only his personal negligence but also negligence of his superintendent within scope of employment, see EMPLOYERS' LIABILITY ACT.

Attorney at Law.

Application of principles of agency to relation of attorney at law and client, see ATTORNEY AT LAW, 1, 2; CONTRACT, 29.

Entry of appearance, unauthorized by instructions, as opposing petition for proving of will, by lawyer as counsel for one who had made compromise arrangement and had agreed not to oppose proving of will, held not to estop client from insisting upon compromise arrangement being carried out, see CONTRACT, 29.

APPEAL.

In equity, see EQUITY PLEADING AND PRACTICE, 8, 7, 12, 13; EQUITY JURISDICTION, 5; MORTGAGE.

From order of judge of Superior Court denying motion "to discharge" auditor's report, see PRACTICE, CIVIL, 4.

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ARREST.

In action against officer for use of excessive force in making lawful arrest, fact that he acted without malice and in honest belief that force used was necessary is no defense, see OFFICER.

ASSAULT AND BATTERY.

In action of assault and battery against officer for using excessive force in making lawful arrest, fact that he acted without malice and in honest belief that force used was necessary is no defense, see OFFICER.

Action against street railway company for alleged assault and battery of plaintiff by conductor of car which was going from end of route to car barn, the plaintiff having insisted upon boarding the car in spite of conductor's refusal to accept him as passenger, see STREET RAILWAY, 7; WITNESS.

ASSESSMENT.

See TAX, 1–7.

ASSIGNMENT.

Construction.

Instrument of assignment stating that assignor did "hereby sell, assign and set over" to assignee promissory note and mortgage renders delivery of note and mortgage unnecessary before assignor can bring action against assignee for purchase price of assignment, see CONTRACT, 24.

For the Benefit of Creditors.

1. The owner of a distilling business assigned it for the benefit of his creditors to three persons, two of whom were presidents of two banks who were creditors, and the third the cashier of a third creditor bank. Among the terms of the assignment were provisions that the assignees should carry on the business if they could show a profit, and that, if after a certain time no profit was shown, they might sell it. The assignees, acting with prudence, gave one C. a power of attorney to conduct the business for them, and, the business not showing a profit in the specified time, sold it for a fair price to another distilling company, the purchase price being paid in shares of the capital stock of the purchasing company. At the time the sale was made, C. was a stockholder in the purchasing company and, to carry out the sale, an increase of $5,000 in its capital stock was voted by the purchasing company and its by-laws were changed by making its board of directors nine instead of seven. C. and one of the assignees, before the execution of the deed of sale, subscribed for $5,000 of the new stock and were elected directors of the purchasing company. The assignor brought a bill in equity against the assignees and the purchaser to

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set aside the sale, and a master to whom the suit was referred found that the assignees had acted honestly and had gained no advantage from the transaction, and that the assets in their hands never were sufficient to pay the claims of the creditors who had assented to the assignment. It did not appear that the purchase of stock by, and the election as directors of the purchasing company of, C. and one of the assignees was a part of the contract of sale to that company, but it did appear that all of the creditors who had assented to the assignment acquiesced in the sale as made and in the purchase of stock by, and the selection as directors of, C. and the assignee. *Held*, that, although the general rule is well settled that a trustee cannot directly or indirectly himself be a purchaser of the trust property or derive any personal advantage or profit from its management, the facts did not bring this case within such rule, and the bill must be dismissed. *Whitman* v. *McIntyre*, 436.

2. The plaintiff in a suit in equity, brought by one, who had assigned a distillery plant to assignees for the benefit of his creditors, against the assignees for an accounting, contended that the assignees had not conducted the business in a prudent and businesslike manner, had wrongfully employed one C. to manage it, and had wrongfully sold it to a corporation for less than it was worth, receiving in payment shares of the capital stock of the purchasing corporation instead of cash. One of the terms of the assignment was that the assignees should carry on the business if they could do so at a profit, and at the end of a year could sell it and convert it into money if at that time they found the condition of the estate to be such that the assignor's debts could not be paid without a sale. A master to whom the case was referred found that there was no actual fraud on the part of the defendants in any respect and that they had not attempted to profit in any improper way at the expense of the estate; that the appointment of C. was agreed to by the plaintiff, and that, in making it, the defendants had acted wisely and for the best interests of the estate, and that C. had acted honestly; that at no time after the assignment was made had the assets been enough to pay the claims of the creditors who had become parties to the assignment, that at the end of a year a fair value of the estate did not exceed $20,000, that thereupon the defendants sold the entire business to a distilling company, taking in payment two hundred shares of the capital stock of the company which was worth from $75 to $100 per share, that the creditors who had become parties to the assignment had consented to the sale, and had agreed to take proportional parts of the shares of stock reserved from the sale in payment of their claims. *Held*, that the bill must be dismissed, since it did not appear that any of the acts of the defendants were wrongful or that their conduct of the business was unbusinesslike; and since, as to the receipt of shares of stock instead of cash for the sale of the business, the facts, that the proceeds of the sale were insufficient to pay the creditors, that therefore no balance could have been paid to the plaintiff, and that the creditors were content with the stock in lieu of cash, made the sale in effect one for cash so far as the creditors, who were the only parties in fact interested in its proceeds, were concerned. *Ibid.*

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Assignment (*continued*).

Gas company cannot refuse, under R. L. c. 58, §§ 16, 17, to supply gas to assignee for benefit of creditors of corporation because bill owed by corporation to gas company remains unpaid, see GAS COMPANY, 1.

ATTORNEY AT LAW.

1. An attorney at law, who is retained generally by a client to render such services as the client may need from time to time, is not the agent of such client to receive notice of the withdrawal of one of the members of a firm to whom the client is about to sell goods, where the attorney at the time he receives the information is not acting for the client in any way and does not know that such client has any business relations with the firm, and does not learn of such relations until after the client has sold the goods to the firm; so that, in an action for the price of the goods sold and delivered brought by the client against the members of the firm including the retiring partner, such knowledge of the attorney is no evidence of notice to the client of the withdrawal of the partner from the firm. *Victor* v. *Spalding*, 52.
2. In an action for the price of goods sold and delivered against the members of a partnership including as an ostensible member one who had retired from the firm before the goods were purchased, it is no evidence of notice to the plaintiff of the withdrawal of this partner from the firm that an attorney at law, who was retained generally by the plaintiff to render such services as the plaintiff might need from time to time but who had no knowledge of the sale of the goods by the plaintiff to the defendants, said a few days after the date of the sale of the first item of goods in the plaintiff's account, that all the creditors knew that the retiring partner was out, how he got out and when he got out, for, even if this statement has been admitted without objection instead of being excluded as hearsay, it is too indefinite to show any notice to the plaintiff of the withdrawal of the partner, where there is nothing to show that the attorney at law in speaking generally of the knowledge of creditors had had any reason to suppose that the plaintiff was among the creditors or that he referred to the plaintiff in any way in making the statement. *Ibid.*

Entry of appearance, unauthorized by instructions, as opposing petition for proving of will, by lawyer as counsel for one who had made compromise arrangement and had agreed not to oppose proving of will, held not to estop client from insisting upon compromise arrangement being carried out, see CONTRACT, 29.

In action for conversion of household furniture, expense to which plaintiff was put for attorney's services in seeking to regain possession of furniture allowed as element of damage, see DAMAGES, 12.

Suit in equity by client to restrain attorney at law from making unauthorized use of money recovered for client, involving question of right of attorney under circumstances to retain funds to satisfy physician's bills incurred for client, see EQUITY JURISDICTION, 20, 21.

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AUTOMOBILE.

The power which was granted to the board of park commissioners by St. 1875, c. 185, § 3, "to make rules for the use and government" of the parks and parkways, which still was in force after the enactment of St. 1903, c. 473, § 8, regulating the operation of automobiles throughout the Commonwealth, remains unaffected by St. 1905, c. 366, § 1, with regard to the regulation of speed of automobiles, which, although not so expressed in terms, must be regarded as an amendment of St. 1903, c. 473, § 14, or by St. 1906, c. 412, § 1, which amended St. 1903, c. 473, § 8. *Commonwealth* v. *Tyler*, 490.

Liability resulting from injuries caused by negligence in use of automobiles, see NEGLIGENCE, 20–22.

St. 1905, c. 366, § 1, as amended by St. 1906, c. 412, § 9, and St. 1907, c. 203, with regard to regulation by boards of aldermen in cities and of selectmen in towns of use of highways by automobiles, are constitutional, see CONSTITUTIONAL LAW, 1, 2.

BANK.

As to national banks, see NATIONAL BANK.

BANKRUPTCY.

Fraudulent Preference.

1. Both the intent of a debtor to make the preference referred to in § 60, a, b, of the bankruptcy act of 1898, as amended by U. S. St. 1903, c. 487, and the reasonable cause on the part of the creditor to believe that such preference was intended, may be shown by circumstantial evidence in a suit brought by the trustee to recover the property so transferred or its value. *Atherton* v. *Emerson*, 199.

2. Where one by a deed absolute in form conveyed land to one who agreed to hold it as security for the payment of a debt owed to the grantee by the grantor, and the land so conveyed was worth less than the amount of such debt, and the grantor in 1876 was adjudicated a bankrupt under the national bankruptcy act then in force and agreed with the grantee to treat the land as payment *pro tanto* of the debt, there was no fraudulent preference, since, the land being of less value than the debt owed, the equity was of no value to the creditors. *Sears* v. *Gilman*, 384.

Suit by trustee in bankruptcy of corporation to recover property conveyed by bankrupt as fraudulent preference and also excessive salary paid to defendant as officer, see EQUITY JURISDICTION, 13–17.

BILLS AND NOTES.

Consideration.

Defense to action on note setting up that note was given to take up former note which was invalid because it was forgery, and that plaintiff, in taking

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the note, made agreement to compound the felony, held not substantiated by evidence, see below.

Validity.

At the trial of an action by the indorsee of a negotiable promissory note against the maker, it appeared that the defendant had signed the note for the accommodation of the payee, from whom by indorsement the plaintiff had received it to settle another note likewise indorsed and held by the plaintiff, that, at the time when the defendant signed the note in suit for the payee, the latter was under an indictment which charged him with having uttered the former note, knowing it to have been forged. The payee testified that, upon his indorsing and delivering the note in suit to the plaintiff, the latter gave to him the alleged forged note and he destroyed it, but evidence introduced on behalf of the plaintiff was to the effect that he gave to the payee of the note in suit merely an order on the district attorney for the first note after he should have finished using it in evidence. There was no evidence that the first note actually was forged, nor as to what was the result of the trial of the payee on the indictment, but it did appear that he testified at such trial that he did not know that the first note was forged. The defendant contended that the consideration for the note in suit was illegal, being an agreement to compound a felony. *Held*, that the defense was not made out, since there was no evidence of an agreement to compound a felony. *Jennings* v. *Law*, 124.

BOARD OF HEALTH.

Municipal.

Foreman of yard of municipal board of health is not holder of office within meaning of that term in civil service rules, but is engaged in labor service of city, see CIVIL SERVICE, 1.

BOND.

Action against sureties on bond of guardian of insane person, see LIMITATIONS, STATUTE OF, 1–3.

Acts of owner of negotiable coupon bonds in placing them in custody of sister in connection with expressed intention that they should remain his property during his life and should thereafter be hers, held not to constitute executed gift, see GIFT.

BOSTON ELEVATED RAILWAY COMPANY.

By § 18 and § 19 of the charter of the Boston Elevated Railway Company, St. 1894, c. 548, a fund of $500,000 was required to be deposited with the treasurer of the Commonwealth. Section 14 of the charter provides that "the Supreme Judicial Court may at any time, on application of said corporation, when it shall satisfy said court that there is no longer occasion for said fund for the purposes of this act, order the said treasurer to pay the same to said corporation or its assigns." That corporation made an

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application by petition to the Supreme Judicial Court for an order for such repayment of the fund. The case was reserved by a single justice with a report of his findings of fact for determination by the full court. It appeared that all the lines of railway specified in § 19 and amendments thereto had been built, and that the whole of the fund was held under the provision of § 13 which declares that the deposit "shall be in the hands of said treasurer a fund out of which any execution issued pursuant to the provisions of the preceding section shall be paid by said treasurer." The executions referred to are those for damages to abutters by reason of the construction, maintenance and operation of the elevated railway. *Held*, that the court would not assume that the sole cause of the requirement of the deposit was the uncertainty of the success of the enterprise when the charter was granted in 1894, and that its purpose was not to provide security in the future as well as in the past for the damages caused to abutters by the construction and operation of the elevated railway, and the petition was dismissed, with the suggestion that if this construction of the charter was erroneous relief could be had by application to the Legislature. *Boston Elevated Railway* v. *Chapin*, 137.

Computation of excise tax which the Boston Elevated Railway Company is required to pay by St. 1907, c. 500, § 10, see TAX, 1.

Unsuccessful attempt by stockholders of Meigs Elevated Railway Company to have incorporators of Boston Elevated Railway Company declared trustees for them of $400,000 alleged to be proceeds of transfer by such incorporators of charter of their new corporation, see TRUST, 1.

BOUNDARY.

Effect of wrong location by decree of Land Court of private way bounding parcel of land, title to which was registered, upon location of way as boundary of other parcels of land, see LAND REGISTRATION.

BROKER.

General rule that, in absence of special agreement, principal by employing broker to get customer does not deprive himself of right to get customer otherwise than through broker, applied to employment of note broker, see AGENCY, 3, 4.

BURGLARIOUS IMPLEMENTS.

See POSSESSION OF BURGLARIOUS IMPLEMENTS.

CARRIER.

Of Passengers.

Who is passenger.

There is no implied offer by street railway company to accept passenger on a car which, having discharged all its passengers at end of route, is returning to car barn without stopping, and persons who insist upon getting upon such car are trespassers, see STREET RAILWAY, 7.

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Contract of limited liability.

1. If one, whose eyesight is so defective that, although he can see large objects, he cannot read print, purchases and accepts from a carrier a ticket upon which a long contract of transportation, with many terms and conditions, is stated, he is bound by such of the terms of the contract as are valid, whether he reads the contract or not. *French* v. *Merchants & Miners Transportation Co.* 433.
2. A provision of a contract of transportation, printed upon a ticket which a passenger accepted, contained a provision that the carrier "shall not be liable for delay, loss, default, injury or damage to passenger, money or effects, arising from fire, robbers, thieves, perils of the sea, rivers, or navigation, deviation, collisions, or accidents to or of machinery, boilers or steam, or from any causes beyond its control. Negligence shall not be presumed." *Held*, that the provision was not invalid as an attempt to exempt the carrier from the consequences of negligence on his part, since it should be construed as exempting the carrier in case he was not negligent. *Ibid.*
3. A transportation company, which by the terms of its contract with a passenger is to transport the passenger's baggage with him, but is exempt from liability for injury to or loss of the baggage which is not caused by its negligence, is not liable for the loss of the baggage while in its possession through a fire which was not caused by its negligence, although, if the carrier had not negligently delayed the transportation of the baggage, it would not have been burned. *Ibid.*

Baggage.

4. A railroad corporation may make a charge of fifteen cents for transporting a pedler's pack which a passenger attempts to take as personal baggage, and may refuse to deliver the pack to the passenger on his refusing to pay this charge for its transportation, and, after a reasonable time, which in this case was twenty-four hours, the corporation also may charge for storage, and has a lien on the pack for the charges both for transportation and storage. *Kawcabany* v. *Boston & Maine Railroad*, 586.

Effect of contract of limited liability where baggage was destroyed by fire while delayed by carrier, see *ante*, 2, 3.

Of Goods.

5. Discussion by SHELDON, J., of the effect of a special contract, made with a carrier of goods by the consignor, upon the liability of the carrier in an action against him by the consignee, which is not based upon a definite contract of shipment between the carrier and the consignee, for failure to deliver the goods to the consignee in as good condition as they were when received by the carrier for transportation; and also of the effect of such a special contract between the consignor and the carrier, when a definite contract as to the shipment previously had been made between the consignee and the carrier. *Henry J. Perkins Co.* v. *American Express Co.* 561.
6. At the trial of an action of contract by one to whom peaches were consigned, against an express company which had received them for transpor-

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tation, to recover for loss of value in the peaches alleged to have been due to improper icing of cars by the defendant, the plaintiff contended and introduced evidence tending to show that he had made a special contract with the defendant to the effect that the cars furnished by the defendant should be cooled before the peaches were put into them. The defendant contended and introduced evidence tending to show that the contract of shipment was made, not by the plaintiff, but by the consignor and that there was no provision that the cars should be so iced. The presiding judge instructed the jury that the testimony as to the contract between the consignor and the defendant should be disregarded unless they should find that the consignor was acting for the plaintiff, the consignee, and the defendant excepted. *Held*, that the defendant's exception should be sustained, since the jury were not bound to find in accordance with the plaintiff's contention, but might on the evidence have found that the only real contract of shipment was made with the consignor and that the defendant therefore was not liable. *Henry J. Perkins Co.* v. *American Express Co.* 561.

CERTIORARI.

Illegal assessment of $19 of total of $34,000 assessed as tax for street watering purposes held not to be sufficient, on petition by persons whose property was assessed for $564 of the tax, to warrant issuance of writ of certiorari quashing the assessment, see TAX, 6.

Certain irregularities in assessment of tax for street watering purposes under R. L. c. 26, §§ 26, 27, considered not sufficient to warrant issuance of writ of certiorari quashing assessment, see TAX, 7.

Certiorari in some cases is proper remedy in case public officer comes to conclusion based on erroneous application of law as to question committed by statute to his decision, see EQUITY JURISDICTION, 19.

CHILMARK.

Writ of mandamus will not be issued to compel Chilmark to maintain school on island of Noman's Land for benefit of two children of petitioner, reasonable facilities and transportation being offered them for schooling on mainland, see SCHOOL.

CITIES AND TOWNS.

See MUNICIPAL CORPORATIONS.

CIVIL SERVICE.

1. One who is employed as foreman of the yard of the health department of a city is engaged in the labor service of the city and is not the holder of an office within the meaning of that term as used in the civil service laws. *Garvey* v. *Lowell*, 47.

2. In an action against a city by one who was employed as foreman of the yard of the health department of the defendant and is alleged to have been

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discharged in violation of the civil service laws by a vote of the board of health of the defendant purporting "to abolish the position of foreman of the yard in the spirit of economy," the plaintiff may introduce evidence to show that the position which he occupied was not abolished in good faith for reasons of economy, but that the vote of the board of health was a mere pretext or device to get rid of the plaintiff on account of his refusal to render political service for one of the members of the board. *Garvey* v. *Lowell*. 47.

CLINTON.

Certain restrictions, imposed by selectmen of Clinton as conditions under which location would be granted to Worcester and Clinton Street Railway Company in 1877 under Pub. Sts. c. 113, § 7, upon its organization, held within powers of selectmen and, upon acceptance by corporation, valid and enforceable, see STREET RAILWAY, 3, 4.

COAL HOLE.

Liability of landlord for injuries to third person due to defective condition of coal hole in sidewalk, such condition existing when premises were let, see LANDLORD AND TENANT, 4–7.

CONFLICT OF LAWS.

R. L. c. 74, § 7, making void certain contracts for sale of securities by others than owner or assignee, applies only to contracts made in this Commonwealth, see WAGERING CONTRACTS, 2.

Wagering contracts made outside Commonwealth are not referred to by provisions of R. L. c. 99, § 4, giving right to recover margins advanced on certain wagering contracts, see WAGERING CONTRACTS, 1.

CONSERVATOR.

Power of Probate Court to allow amendment to petition for appointment of conservator, and dismissal of appeal from decree refusing to remove him, see PROBATE COURT, 3, 4.

CONSTABLE.

See OFFICER.

CONSTITUTIONAL LAW.

Police Power.

1. The Legislature have the right, acting under the police power, to prescribe that automobiles shall not pass over certain streets or public ways in a city or town. *Commonwealth* v. *Kingsbury*, 542.
2. St. 1905, c. 366, § 1, as amended by St. 1906, c. 412, § 9, providing that boards of aldermen in cities and of selectmen in towns may make special

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regulations as to the speed of automobiles and as to their use "on particular roads or ways, including their complete exclusion therefrom," and providing also for publication of the regulations, and for an opportunity to be given for a protest against the action of such a board to the State highway commission by at least fifty residents of the Commonwealth, ten of whom must be taxpayers of the city or town affected, and providing that, in case of such protest, the regulations shall not be effective until a hearing thereon and a decision of the commission approving of the regulations, is not an improper delegation by the Legislature to the aldermen and selectmen of the power to make laws, but is a proper exercise of the police power by the Legislature, and therefore is constitutional, as also is St. 1907, c. 203, fixing a penalty for a violation of such a regulation. *Commonwealth* v. *Kingsbury*, 542.

3. It would be a proper exercise of the police power for the Legislature to forbid the sale of incorrect tables of value to be used by dealers as correct tables of value in making sales of articles by pounds and ounces, and equally so to prohibit the sale of such a table when it is made a part of an automatic self-computing scale. *Moneyweight Scale Co.* v. *McBride*, 503.

It is proper exercise of police power of Legislature to regulate practice of medicine, see PHYSICIANS AND SURGEONS, 1.

St. 1907, c. 576, § 75, stating certain requirements as to substance and form of policies of life and endowment insurance, and making provision for their enforcement, is constitutional as proper exercise of police power, as well as proper exercise of control over corporations, see INSURANCE, 6.

Executive and Judicial Functions.

4. A statute, which should require the sealers of weights and measures to pass upon the commercial correctness of self-computing scales or other devices and to determine finally the question how great a departure from mathematical accuracy is permissible in fixing the values of small articles sold by weight without making the transactions commercially and therefore legally incorrect, and also to determine the question whether a table of values, which are only commercially correct because they disregard fractions of a cent, is a proper basis for finding the true weight of articles sold by the cent's worth, would be unconstitutional, these being judicial questions which cannot be left to the final determination of an executive officer. *Moneyweight Scale Co.* v. *McBride*, 503.

St. 1907, c. 535, is constitutional, see WEIGHTS AND MEASURES, 1.

Delegation of Power by Legislature.

St. 1905, c. 366, § 1, as amended by St. 1906, c. 412, § 9, giving power to boards of aldermen in cities and of selectmen in towns to regulate use of highways by automobiles, are not unconstitutional as being improper delegation of legislative power, see *ante*, 2.

Eminent Domain.

Legislature may authorize taking of property under right of eminent domain by act *in pais*, see EMINENT DOMAIN.

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Raising of Question of Constitutionality of Statute.

Instance where question of constitutionality of statute was allowed to be raised by person not party to suit but interested in effect to be given to statute, because both plaintiff and defendant were precluded from raising it, see PRACTICE, CIVIL, 16.

CONTRACT.

What constitutes.

1. At the hearing upon a bill in equity brought by the daughter of a testatrix against the testatrix's son, who was her only other heir or next of kin, to enforce an agreement in writing with regard to the disposition of the estate, it appeared that the defendant, who lived in a distant city, arrived in the city, where his mother had lived, on the afternoon of the day on which she died, that the next morning he told the plaintiff, who had been estranged from her mother for ten years, that "there was a will leaving him everything and her nothing," which was the only knowledge that the plaintiff then had of such a will, that the plaintiff thereupon in good faith stated to the defendant that she would contest the will on the ground of undue influence and want of sanity, and on the evening of that day the plaintiff and the defendant signed the following agreement: "In settlement of the estate of [the mother], it is agreed between [the defendant] and [the plaintiff] that [the plaintiff] will have one third of the estate and [the defendant] will have two thirds," and the plaintiff, in consideration of the defendant's agreement thus to share the estate with her, promised not to make any contest. The funeral of the mother occurred the next day, and, thereafter, the defendant stated that he would not keep the agreement. *Held*, that at the time of the signing of the agreement a contract was made for a valid consideration, from which the defendant could not withdraw. *Blount* v. *Wheeler*, 330.

One whose eyesight is so defective that, although he can see large objects, he cannot read print, is nevertheless bound by condition limiting liability of carrier which is printed on long ticket purchased and accepted by him, see CARRIER, 1.

In Writing.

2. The rule that an agreement in writing cannot be varied or contradicted by oral testimony is not a mere rule of evidence but is one of substantive law, and rests on the principle that where the parties deliberately have put their agreement in writing they shall not be allowed to say that the agreement was something else. For this reason testimony at a trial showing an oral agreement which tends to vary the terms of a contemporaneous contract in writing between the same parties can have no effect to change the terms of the contract although it has been admitted without objection and has become a part of the evidence in the case. *Mears* v. *Smith*, 319.

Application of this principle, see *post*, 12.

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Consideration.

3. An agreement by an intending litigant to forbear from litigating a claim, which he in good faith at the time of his agreement thinks is valid, is a good consideration for a contract, although by the state of the law and of the facts as they ultimately are discovered to be, the claim, the prosecution of which is forborne, is neither valid nor enforceable. *Blount* v. *Wheeler*, 330.

Thus, agreement between daughter and son of deceased testatrix whereby son, in consideration of daughter's agreeing not to contest will, agreed to divide estate with her, held to have valid consideration under circumstances, see *ante*, 1.

Defense to action on note setting up that note was given to take up former note which was invalid because it was a forgery, and that plaintiff, in taking the note, made agreement to compound a felony, held not substantiated by evidence, see BILLS AND NOTES.

Construction.

4. As a part of a contract for the sale of all the capital stock of a corporation, the seller "guaranteed" that the liabilities of the company did not exceed by more than $100 a certain amount. In a suit to recover the amount of the purchase price, it appeared that the liabilities of the corporation were $523 more than the sum mentioned in the contract of sale, and the defendant contended that such sum should be deducted from the purchase price. *Held*, that $423 only should be deducted under the terms of the contract. *Childs* v. *Krey*, 352.

5. A contractor has done all that is required of him under a contract whereby for a certain sum he agreed with the owner of a tract of land "to fill" two streets thereon to a certain level and finish them ten feet wide at the top, the materials for the construction to be taken from the owner's land and the work to be completed by a certain date, when he has so filled and finished the streets in a workmanlike manner within the time set; and the fact that, thereafter, through no fault of his, the surfaces of the streets settle below the prescribed level, does not affect his right to recover the contract price for the work. *Duncan* v. *Cordley*, 299.

6. In a suit by the inventor and patentee of a certain article against the manufacturers of the article, for an accounting under a contract in writing between the plaintiff and the defendants, by which the plaintiff gave to the defendants the exclusive right to manufacture and sell the article and the defendants agreed to employ the plaintiff and pay him $20 a week during the continuance of the agreement, and also agreed to pay to the plaintiff one half the net profits realized from the manufacture and sale of the article, to be computed and paid quarterly, the defendants are not entitled to charge interest upon the amount of money advanced by them in carrying on the business. *Thurston* v. *Hamblin*, 151.

7. In a suit in equity by the inventor and patentee of a certain kind of hooks against the manufacturers of the hooks, for an accounting under a contract

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in writing between the plaintiff and the defendants, by which the plaintiff gave to the defendants the exclusive right to manufacture and sell the hooks and the defendants agreed to employ the plaintiff and pay him $20 a week during the continuance of the agreement, the contract provided that the defendants should pay to the plaintiff "one half of the net profits realized from the manufacture and sale of said improved wardrobe and other hooks made under this agreement, said profits to be computed and paid quarterly during the months of January, April, July and October in each year." *Held*, that under this agreement the plaintiff was not entitled to one half of the net profits of any one quarter considered by itself regardless of whatever losses might have been sustained in previous quarters, but that at the end of each successive quarter the plaintiff was entitled to one half of any net profits of the whole enterprise down to that time that then remain undivided, and that, if at the end of any quarter there were such net profits to be divided, the plaintiff's right to one half of such net profits vested and his share then realized was not to be cut down or diminished by any subsequent losses. *Thurston* v. *Hamblin*, 151.

8. The proprietor of a coal mine agreed in writing with a coal merchant to ship to him at a price named twenty-five hundred tons of coal in each month from September 1, 1902, until April 1, 1903. The contract contained the following provision: "Should we fail to ship you the full tonnage due you from September 1, 1902, to April 1, 1903, in about equal monthly quotas, we authorize you to go out into the open market and buy any balance unshipped, sending us the bill for the difference in price, if any." *Held*, that the provision quoted was inserted for the benefit of the buyer and gave him a privilege to be exercised at his option and was not provided as the exclusive means for ascertaining or liquidating the buyer's damages in case of a failure of the seller to ship the required amount of coal in each month during the period named, so that, in case of such a breach of the contract by the seller, the buyer did not waive his claim for damages by failing to buy coal to fill the deficiencies and sending bills to the seller for the difference in price. *Garfield & Proctor Coal Co.* v. *Pennsylvania Coal & Coke Co.* 22.

9. A contract in writing for the sale and delivery of coal began as follows: "We have this day sold you fifty thousand tons bituminous coal to be shipped as follows: twenty five hundred tons per month from September 1, 1902, until April 1, 1903, at price of $2.80 per gross ton . . ., balance of tonnage, about thirty two thousand five hundred tons, to be shipped in about equal proportions between April 1 and September 1, 1903, at the price of $2.60 per gross ton." A subsequent provision was as follows: "Should we fail to ship to you the full tonnage due to you from September 1, 1902, to April 1, 1903, in about equal monthly quotas, we authorize you to go into the open market and buy any balance unshipped, sending us bill for the difference in price, if any." *Held*, that by this agreement the seller was bound to ship at least twenty-five hundred tons of coal in each month from September 1, 1902, to April 1, 1903; that the words "in about equal monthly quotas" as used in the clause providing a mode for the assessment of damages could not control the express stipulation with

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which the contract opened, the clause being inserted, not for the purpose of defining the obligation of the seller as to shipments, but to provide a ready means of settling the damages in case of a breach of the contract, and that the utmost effect that could be given to the words "in about equal monthly quotas" would be to treat them as giving the seller liberty to ship somewhat more than twenty-five hundred tons in any particular month. *Garfield & Proctor Coal Co.* v. *Pennsylvania Coal & Coke Co.* 22.

10. In an action for damages incurred by reason of the alleged failure of the defendant to deliver coal to the plaintiff at the times and in the amounts required by the terms of a contract in writing, under which the defendant was bound to ship to the plaintiff at least twenty-five hundred tons of coal "f. o. b. vessel" at a port named in each month during a period named, where it appeared that there was no storage for coal on the piers from which the coal was shipped, that a vessel arriving for coal anchored in the stream to await her turn to load, that when she took her place at the piers the coal was dumped into her from the railroad cars which brought it from the mines, that when the vessel was loaded she left the piers, and the coal, then and not before, was billed by the defendant to the plaintiff, it was *held*, supporting the findings and rulings of an auditor as adopted by the trial judge, that the meaning of the contract was that the defendant should place twenty-five hundred tons of coal each month on vessels to be furnished by the plaintiff, so that the vessel or vessels during the month could sail for their destination with at least twenty-five hundred tons, that it was the duty of the plaintiff to furnish each month vessels capable of carrying the twenty-five hundred tons, and that a failure to do so would excuse the defendant, that, if the plaintiff in any month sent a vessel capable of carrying more than twenty-five hundred tons, the defendant's obligation for that month ceased upon its loading the twenty-five hundred tons into the vessel during the month, and, if the plaintiff saw fit to hold the vessel over for a full cargo, it could not show any breach of the defendant's contract for that month, but that the dates of the respective shipments were the dates when the vessels were loaded and ready to sail and were not the dates when portions of the coal were dumped into a vessel from time to time before she was loaded sufficiently to be ready to sail. *Ibid.*

11. At the hearing upon a bill in equity by the daughter of a testatrix against the testatrix's son, who was her only other heir or next of kin, to enforce an agreement in writing with regard to the disposition of the estate, it appeared that the defendant had announced to the plaintiff, after the mother's death and before her funeral, that she had made a will leaving everything to him and nothing to the plaintiff, which was the only knowledge that the plaintiff then had of such a will, that, after some discussion, the plaintiff and the defendant, in consideration of the plaintiff's forbearing to contest the probate of the will, as she in good faith had intended to do if the compromise had not been made, agreed in writing as follows: "In settlement of the estate of [the mother], it is agreed between [the defendant] and [the plaintiff] that [the plaintiff] will have one third of the estate and [the defendant] will have two thirds." The agreement

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was written by the plaintiff and both parties acted without legal advice, and in ignorance of their legal duties as to producing and proving the will, but they believed that they could settle the estate without proving the will, which neither of them had seen. The will contained several specific legacies to other persons than the plaintiff or the defendant. The judge who heard the case found that "the belief of the parties that they could settle the estate without probating the will and any understanding based upon that belief were merely incidental to the written agreement, and connected with it as a condition. . . . The agreement, fairly construed in the light of all the surrounding facts, means that such property as might remain in the estate after all lawful claims were paid should be divided in the proportions named, and does not require that the legacies shall not be paid or that the will shall not be probated." *Held*, that the conclusion of the judge was warranted. *Blount* v. *Wheeler*, 330.

12. In an action by an insurance agent against the general agent of an insurance company upon an alleged oral agreement that if the plaintiff should leave the company at any time the defendant would pay him commissions for two years thereafter on all renewal premiums paid on policies written by the plaintiff for the company, provided the defendant remained with the company, the plaintiff testified that at a certain time negotiations took place between him and the defendant in regard to the signing of a renewal contract of his employment as agent, that the defendant at first refused to renew the oral agreement in regard to commissions on renewal premiums, but that finally the defendant said, in substance, that if the plaintiff would sign the contract the defendant would allow him the commissions for two years in case he should leave the company at any time, that the plaintiff asked the defendant to put that into the contract, but that the defendant said that he could not do that as the company would not indorse the contract, but that he would agree orally to pay the commissions so long as he remained with the company, and that shortly after this conversation the renewal contract of the plaintiff's employment as agent was signed by the plaintiff and the defendant, and continued in force until the plaintiff severed his connection with the company. No objection was made to the admission of the testimony in regard to the oral agreement. The contract in writing provided in detail what commissions on renewals and other premiums should be paid to the plaintiff, and also provided for the payment in certain contingencies of commissions on renewal premiums for two years after the plaintiff should have ceased to act as agent of the company. The contract also contained the following provision: "It is further understood and agreed that upon the discontinuance of this contract in any way, all interest of said agent in this contract in commission on premiums shall revert back to said general agent, except as above mentioned and upon the deferred semi-annual and quarterly premiums on new business, unless it is otherwise specially agreed." The plaintiff contended that by the oral contract sued upon by him it was "otherwise specially agreed" within the meaning of the phrase last quoted. *Held*, that the phrase relied upon by the plaintiff referred only to future special agreements and did not mean that the contract in writing could be rendered nugatory by

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contemporaneous oral agreements; therefore, that, without considering certain other provisions of the contract in writing which appeared to be fatal to the plaintiff's contention, and without considering whether the alleged agreement was within the statute of frauds as one not to be performed within a year, or other matters of defense, the plaintiff could not be allowed to recover on the oral agreement which by his own testimony varied the terms of the agreement in writing between him and the defendant, and that a verdict properly was ordered for the defendant. *Mears* v. *Smith*, 319.

13. In an action to recover for the alleged breach of a contract in writing between the plaintiff and the defendant, a corporation, by which the defendant was to furnish the capital for establishing and conducting the business of manufacturing and selling wire rope and the plaintiff was to furnish his skill and devote all his time to the business, and the "net profits" were to be shared equally between the plaintiff and the defendant, it appeared that the defendant before the making of the contract was engaged in manufacturing wire cloth and that the new business of manufacturing and selling wire rope was to be carried on as a separate department of the defendant's business to be known as the wire rope department, that the amount of capital to be furnished by the defendant was $50,000 and no interest was to be paid on that sum. The contract provided as follows: "The said capital to be represented by proper building or buildings suitable for making rope of various kinds and qualities from wire, with power and machinery sufficient to so manufacture such rope to the amount of $100,000 (present sales price) per annum, and by the amount of capital necessary to purchase or provide the wire necessary for the production of rope to the amount named per annum, meaning that the said party of the first part [the defendant] is to provide all that is necessary for the equipment and establishment of the wire rope business to the extent above specified, together with the proper facilities for carrying on the same and the same is to be provided as soon as practicable." Another provision of the contract was as follows: "In ascertaining the net earnings the cost or expenses of the business shall be made up the same as if this department were a separate company allowing for taxes on the capital employed and other charges as usual." In computing the "net earnings" to be shared with the plaintiff under the contract in a certain year the defendant charged against the gross earnings, a sum for depreciation of buildings and machinery, another for power furnished by it to the wire rope department, another for repairs, another for insurance, and another for a loss of finished product destroyed while in a warehouse "hired maintained and managed" by the wire rope department. The plaintiff objected to each of these charges, and rested his claim for damages upon his alleged right to have them disallowed. *Held*, that each of these charges was a proper deduction in computing the "net profits" to be shared equally by the plaintiff and the defendant under the contract, and that for this purpose it did not matter whether the contract created a partnership, as, if it did not, the plaintiff was to be paid for his services in "net profits" on the same basis as if the plaintiff and the defendant had been partners; that, in comput-

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ing the net profits of a business, depreciation, repairs and loss of finished product are proper charges against gross earnings; that insurance was a "usual" charge of a business within the meaning of the provision of the contract above quoted, and that, without such provision, the deduction was a proper one, if the plaintiff did not object to the buildings and machinery furnished by the defendant as capital being insured; and that the charge for "power" also was deducted properly, as the provision in the contract that the defendant should provide proper buildings "with power and machinery sufficient to so manufacture such rope" meant that the defendant should provide buildings equipped with power and not that the power should be furnished free of charge. *Stone* v. *Wright Wire Co.* 306.

Construction of contracts of insurance, see INSURANCE, 1–3.

Construction of contract between note broker and one seeking a loan, see AGENCY, 3, 4.

Construction of contract on ticket issued to passenger by transportation company exempting carrier from liability for loss of baggage arising from various enumerated perils and accidents "or from any causes beyond its control. Negligence shall not be presumed," see CARRIER, 2, 3.

Construction of contract in writing for building factory, involving question whether arbitration by owner was necessary before recoupment by owner of liquidated damages provided for in contract in case of delay by contractor, see *post*, 14.

Construction of provision in building contract that work should be done "subject to acceptance by" owner, a corporation, "and its vice president," see *post*, 20; and also of provision in specifications annexed to contract with regard to supplying new part in place of part proving defective within two years, see *post*, 19.

Building Contract.

14. In an action by a contractor to recover a balance alleged to be due for the construction of a factory building for the defendant under a contract in writing, in which the defendant sought to recoup damages from the plaintiff for the plaintiff's delay in completing the building, the paragraph of the contract relied on by the defendant for this purpose provided that the contractor should complete the whole of the work by a day named, and that in the event of his failing to do so he should allow and pay the owner $50 for every day after the date named until the whole of the work was fully completed, with a provision that if the contractor completed the work before the day named the owner should allow and pay him $50 for every day before the date named that the work was fully completed. This was in substance the whole of the paragraph and there was no provision in it for arbitration. In a paragraph in regard to alterations there was a provision for arbitration in case either party was dissatisfied with the decision of the architect. In a paragraph in regard to delay caused by the neglect or default of the owner or by other causes named which were not the fault of the contractor, there was a similar provision for arbitration. A like provision for arbitration was contained in still another paragraph in regard to the obligation of the owner to provide all labor and

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materials not included in the contract in such a manner as not to delay the progress of the work. In the paragraph in regard to the payments to be made by the owner to the contractor upon certificates of the architect that such payments had become due there was no provision for arbitration. It appeared that the building was not completed until sixty-five days after the day named for completion in the contract. The defendant claimed damages for the plaintiff's delay, and the plaintiff proposed that the matter should be submitted to arbitration in the manner provided in the paragraphs of the contract containing such provisions. The defendant refused to leave the question to arbitration. *Held*, that a provision for arbitration could not be imported into the paragraph providing for liquidated damages for the owner in case of delay on the part of the contractor, and that submission to arbitration was not a condition precedent to recoupment by the defendant of his damages for such delay. *Norcross Brothers* v. *Vose*, 81.

15. In an action by a contractor to recover a balance alleged to be due for the construction of a factory building for the defendant under a contract in writing, it appeared that by the terms of the contract all payments were to be made "upon written certificates of the architect to the effect that such payments have become due," that the final payment should "be made within thirty-five days after this contract is fulfilled," and "that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials." The plaintiff completed the building but failed to complete it within the time required by the contract and some of the work was defective. After the completion of the building the plaintiff sent to the defendant a bill for $16,690. This bill was returned to the plaintiff by the architect with the following indorsement upon it signed by the architect: "Approved for sixteen thousand six hundred nineteen dollars and ninety cents ($16,619.90) less the sum of allowance agreed upon." There were figures in pencil showing the deduction of $70.10. This bill was returned to the plaintiff enclosed with a letter from the architect, in which he referred to a letter from the plaintiff asking him to pass upon the questions at issue between the plaintiff and the defendant, the two main points of contention being in regard to defective concrete work and delay in the completion of the building, the architect in his letter naming $6,000 as his estimate of the amount of the allowance to be made for defective concrete work and $3,000 as his estimate of the amount to be allowed for delay, and stating at the conclusion of his letter, "Your bills are returned approved with the exception of three small items." The plaintiff contended that the written approval of the architect upon the plaintiff's final bill was a final certificate approving the payment of $16,619.90 and was conclusive as to the right of the plaintiff to receive that amount, and further, that, if this was not so, the architect's approval of the bill, taken together with his letter, was a final certificate that the allowance on account of defects in the concrete work should not be more than $6,000. *Held*, that the qualified

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approval of the architect on the plaintiff's bill was not a final certificate within the meaning of the contract, to be treated as conclusive evidence of performance, but that, even if it were given effect as a certificate, the architect's approval did not bind the defendant to the acceptance of either work or material which was not in accordance with the contract or preclude him from the recoupment of damages. *Norcross Brothers* v. *Vose*, 81.

16. In an action by a contractor on a contract in writing, with a count on an account annexed, to recover a balance alleged to be due for constructing a building on land of the defendant, if it appears that the plaintiff constructed the building but failed to complete it within the time required by the contract and that portions of the work were defective, the plaintiff can recover on his account annexed an amount not exceeding the agreed price diminished by the amount of payments and of all damages suffered by the defendant from the plaintiff's breaches of the stipulations of the contract. *Ibid.*

17. In an action by a contractor to recover a balance alleged to be due for the construction of a piano factory for the defendant under a contract in writing, where it appeared that the concrete floors of the building were defective and were not constructed in accordance with the specifications of the contract, and the defendant sought to recoup damages on this account, it was *held*, that the measure of damages to which the defendant was entitled in recoupment on this account was the difference between what the value of the floors would have been if they had been constructed in accordance with the specifications and their value as built and left by the plaintiff. *Ibid.*

18. In an action by a contractor to recover a balance alleged to be due for the construction of a piano factory for the defendant under a contract in writing, where it appeared that the concrete floors of the building were defective and were not constructed in accordance with the specifications, and the defendant sought to recoup damages on this account, the jury were taken to view the concrete floors and had an opportunity to see the condition of the surface and the general character of the work. The judge in his charge to the jury directed their attention to the defendant's contention that the only way in which the floors could be rendered serviceable was to reconstruct the surface by putting on the finish called for by the contract. He then instructed the jury that, if they found that resurfacing was not only a reasonable but a practical method of repairing the damage, their estimate of the cost of such resurfacing would be the measure of damages, but, if they deemed such repairs inexpedient or the evidence was insufficient to enable them to estimate the probable expense, they were to give the matter no further consideration. *Held*, that these instructions gave the plaintiff no cause for complaint. *Ibid.*

19. In an action by a street railway company, which was erecting on a wharf belonging to it a large pocket for the storage of coal to be brought to the wharf in vessels, for alleged breaches of a contract in writing to construct for the plaintiff, by a date named and in accordance with certain specifications, two hoisting towers for hoisting coal from the vessels to the top of the pocket, one of the specifications was as follows: "The

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contractor guarantees that the apparatus furnished by him shall be ample and suitable in design and construction to perform the work as hereinafter specified, and that it shall be free from all defects in workmanship or material. He also agrees to furnish free of charge to the railway company any part proving defective in the apparatus or any part thereof within two years after date of complete installation in working order of said apparatus." Within two years after the date of installation, while hearings in the case were being had before an auditor, a crack appeared in the frame of the engine of each tower. The auditor found that these cracks came, not from a faulty design, but from some fault in the casting and that they constituted "a serious defect." It seemed that the plaintiff continued to use the engines after the cracks appeared. The engines were not in any way affixed to the land. *Held*, that, if the defect gave the plaintiff a right to reject the engines altogether, which was not passed upon, such right had been waived by the plaintiff's continued use of the engines. *Held, also*, that the specification above quoted gave the plaintiff the right to elect whether, on the discovery of such a defect within two years, it would call for a new part or would claim damages, and that the right to call for a new part was not an exclusive remedy. *C. W. Hunt Co.* v. *Boston Elevated Railway*, 220.

20. In an action by a contractor against a street railway company, which was erecting on a wharf a large pocket for the storage of coal to be brought to the wharf in vessels, for a balance alleged to be due under a contract in writing to construct for the defendant in accordance with certain specifications two hoisting towers for hoisting coal from the vessels to the top of the pocket, it appeared that the contract contained the following provision: "The contractor agrees that all material furnished and work done hereunder shall be subject to acceptance by the railway company and its vice president; that all apparatus furnished and work done shall be subject at all times to the inspection of said vice president or his authorized agents, and that any work performed or material furnished which may be deemed by said vice president to be not in accordance with the terms of this contract and accompanying specifications shall be immediately replaced by the contractor at his own expense." The specifications provided that the work should be executed under the direction and supervision of the vice president of the railway company or his authorized representative, and that the vice president, "without relieving the contractor from any responsibility therein" reserved the right to direct the manner and order in which the work should be executed. The vice president executed the contract in behalf of the defendant and the correspondence which took place under the contract was conducted for the defendant by him. *Held*, that the vice president represented the defendant in the transaction and therefore was not in the position of a third person named as an arbitrator; consequently that the work was to be done to the satisfaction of the defendant, and, this being a business contract into which matters of personal preference did not enter, that, if the towers as built by the plaintiff were not satisfactory to the defendant's vice president, the plaintiff still could recover the contract price on showing that the towers were so constructed

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that they ought to have satisfied any reasonable man as a performance of the contract. *C. W. Hunt Co.* v. *Boston Elevated Railway*, 220.

21. In an action by a contractor against a street railway company, which was erecting on a wharf a large pocket for the storage of coal to be brought to the wharf in vessels, for a balance alleged to be due under a contract in writing to construct for the plaintiff, by a certain date and in accordance with certain specifications, two hoisting towers for hoisting coal from the vessels to the top of the pocket, the contract required that the work should be done to the satisfaction of the defendant and its vice president acting as its representative. Six months after the first tower and five and a half months after the second tower should have been completed and in working order, the defendant's vice president sent to the plaintiff a letter stating that "Up to this time there is no indication that these towers are likely to prove in any degree adequate or satisfactory," complaining that the plaintiff's men had left the work and ending as follows: "Unless you proceed without further delay to complete your contract we shall be compelled to install an efficient apparatus at your expense." In answer the plaintiff wrote a letter asking the defendant to point out any feature of the contract not carried out. This resulted in interviews and correspondence in which the disputed matters were discussed under fourteen heads, until on the third day of a month, a month and a half after the beginning of the correspondence, the defendant's vice president wrote to the plaintiff as follows: "I now have your letter of 2nd inst. and am pleased to note that you now wish to immediately proceed with the completion of the towers in accordance with my letter of the 24th ult. We supposed you would do so immediately on receipt of that letter, nor was there anything in your subsequent letter of the 27th ult. which appeared to be in conflict with the work proposed to be done. We were therefore at a loss to understand your telegram of 1st inst. So far from holding up the work, we have demanded and do demand that you proceed forthwith to complete your contract. You mention a desire that we should, in acknowledging your letter, state that the work can proceed to completion without interruption. We have no desire whatever to interrupt the work, but we waive none of our rights under the contract to reject any or all of it if it proves unsatisfactory when completed." *Held*, that the last sentence above quoted reserved the defendant's right to accept or reject the work done under the contract as modified by the interviews and correspondence, and that defects which had not been pointed out and insisted upon at the time the last letter was written were waived. *Ibid.*

Validity.

22. A contract made in violation of law cannot be enforced by setting it up as a defense to a cause of action otherwise well grounded. The parties to such a contract are left by the law where their own acts have placed them. *Horn* v. *Dorchester Mutual Fire Ins. Co.* 534.

23. Signing and delivering on the Lord's day an agreement dated on a secular day to cancel an insurance policy and receiving in exchange a check for

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the return premium is a penal offense under St. 1904, c. 460, § 2, and the agreement of cancellation procured by such illegal transaction is no defense to an action on the policy to which it relates. *Horn* v. *Dorchester Mutual Fire Ins. Co.* 584.

Validity of certain agreement to compromise contest as to will, see *ante*, 8, 11.

Defense to action on note setting up that note was given to take up former note which was invalid because it was a forgery, and that plaintiff, in taking the note, made agreement to compound the felony, see BILLS AND NOTES.

R. L. c. 74, § 7, making void certain contracts for sale of securities by others than owner or assignee, does not affect validity of such contracts made outside this Commonwealth, see WAGERING CONTRACTS, 2.

Contract on ticket issued to passenger by carrier, which stated that carrier was exempt from liability for loss of baggage arising from various enumerated perils and accidents "or from any causes beyond its control. Negligence shall not be presumed," held not to be invalid as seeking to exempt carrier from liability for negligence, see CARRIER, 2.

Rescission.

Rescission of contract not allowed in case where party desiring to rescind was unable to place other party *in statu quo*, see *post*, 24.

Waiver of Provisions of Contract.

Whether, under circumstances, there was waiver of provisions of certain building contract, see *ante*, 19, 21.

Discharge of Parol Trust by Subsequent Parol Agreement.

Discharge of parol agreement that land should be held as security for payment of debt owed by grantee to grantor, by subsequent parol agreement leaving title absolute in grantee, see TRUST, 10; EQUITY JURISDICTION, 12.

Variation of Contract in Writing.

Rule that unambiguous agreement in writing cannot be varied or contradicted by testimony of oral agreement made before agreement in writing is rule of substantive law and not of evidence. Application of rule where testimony was admitted without objection, but defendant moved to have verdict directed for him and motion was granted, see *ante*, 2, 12; PRACTICE, CIVIL, 10.

Implied.

In fact.

Recovery on account annexed allowed to contractor, who had made contract in writing for construction of factory building, although he failed to complete building within time set and there were imperfections in work, see *ante*, 16.

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For supplying Coal.

Consideration of contract in writing for sale and delivery of coal with regard to its construction, waiver of its terms, certain alleged breaches, and assessment of damages therefor, see *ante*, 8–10; *post*, 25–27; EVIDENCE, 4, 15, 17; PRACTICE, CIVIL, 8; DAMAGES, 11.

To recover Margins paid on Wagering Contracts.

Right given by R. L. c. 99, § 4, to recover margins advanced under certain wagering contracts does not apply to contracts made outside Commonwealth, see WAGERING CONTRACTS, 1.

To compromise Contest as to Will.

Consideration, construction, validity and performance of contract to compromise contest as to will, see *ante*, 1, 3, 11; *post*, 29; EQUITY JURISDICTION, 4.

Performance and Breach.

24. The payee of a promissory note secured by a mortgage of personal property brought an action of contract against the maker and attached by trustee process various accounts due to the maker. The maker thereupon made an assignment for the benefit of his creditors to one who, in order to release the accounts attached, personally agreed in writing with the payee of the note that the payee "does hereby sell, assign and set over" to the assignee the promissory note and the mortgage, and authorized the assignee to discontinue the action which the payee had brought against the maker, and, "in consideration thereof," the assignee personally agreed to pay the payee the amount of the note. The trustees in the action brought by the payee thereupon were discharged, and the assignee procured from them the amounts which had been due his assignor, but, the payee not first delivering the note and mortgage to him, the assignee refused to pay the amount thereof to the payee, and an action was brought against the assignee on the contract to enforce such payment. The defendant in his answer claimed damages in recoupment because of the failure of the plaintiff to deliver the note and mortgage to him, but at the trial offered no evidence of any such damage, but admitted that he had not paid the plaintiff, and the presiding judge directed a verdict for the plaintiff. *Held*, that the verdict was directed properly, since by the terms of the agreement the title to the note and mortgage and the right to proceed under them were transferred to the defendant and therefore delivery of the note and mortgage to him was not a condition precedent to the plaintiff's right to recover on the contract, and, the defendant not being able to place the plaintiff *in statu quo*, he had no right to rescind the contract, but must perform it. *Mayberry* v. *Sprague*, 801.

25. Where a seller has agreed to deliver goods in specified amounts at certain times, and fails to comply with the terms of his contract as to the times at which the specified amounts shall be delivered, but ultimately delivers all the goods stipulated for by the contract, the buyer by taking

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what he can get under the contract when he can get it does not necessarily, as matter of law, waive his claim for damages for a failure to make the deliveries at the agreed times and in the agreed quantities. *Garfield & Proctor Coal Co.* v. *Pennsylvania Coal & Coke Co.* 22.

26. In an action by a coal dealer against the owner of coal mines for the alleged breach of a contract in writing for the sale and shipment of a certain amount of coal in each month during a period named, the contract containing a clause making the deliveries of coal subject to strikes, accident and causes beyond the control of the defendant, the trial judge ruled in substance that the defendant would not be liable for deficiencies on its part which were due to a strike or a shortage of cars or other causes beyond its own control, if under the circumstances it had treated the plaintiff fairly and ratably with reference to the various other parties with whom it was dealing, and that the defendant was not bound under the terms of the agreement to deliver to the plaintiff the whole amount of its order to the exclusion of other customers entitled to receive coal under contracts with the defendant. The judge added the following: "But when the defendant was in default to the plaintiff, or when it became reasonably apparent to the defendant that it could not supply the coal called for under its contract with the plaintiff, it could not then enter into new obligations and rely upon deliveries of coal in fulfilment of such obligations to support its defense that its default to the plaintiff arose from causes beyond its control." *Held*, that the general ruling was correct, and that the additional ruling also was correct. *Ibid.*

27. In an action for damages incurred by reason of the alleged failure of the defendant to deliver coal to the plaintiff at the times and in the amounts required by the terms of a contract in writing which contained a clause making the delivery of coal subject to causes beyond the defendant's control, if it appears that the defendant failed to make the deliveries at the times required by the contract but afterwards shipped substantially all the coal stipulated for and that the plaintiff received and paid for it without any reservation or claim for damages on account of delay, and made statements of satisfaction with the conduct of the defendant, this does not constitute, as matter of law, a waiver of the plaintiff's claim for damages for breach of contract if it also appears that the acts and statements of the plaintiff, relied on to show a waiver, were done and made when the plaintiff supposed that the defendant unavoidably had been prevented by a scarcity of coal from making its deliveries more promptly, and when the plaintiff was ignorant of the fact, afterward discovered by it, that during the period in which the defendant failed to make the deliveries of coal to the plaintiff called for by the contract it was making deliveries to other persons, which it was not under obligation to make, of coal more than sufficient in amount to comply with the requirements of the contract. *Ibid.*

28. At the trial before a judge without a jury of an action for breach of a contract in writing whereby the defendant agreed to convey certain real estate to the plaintiff for the sum of $1,000 to be paid by the plaintiff on a certain day, there was evidence that, before the expiration of the time within which the money was to have been paid, an agent of the defend-

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ant interviewed the plaintiff and presented a deed to which the plaintiff objected because of an alleged defect in the acknowledgment, that the agent at the request of the plaintiff sent another deed running to a different grantee to the defendant for execution and proper acknowledgment, and that the plaintiff did not tender any cash to the agent. The plaintiff testified and the agent denied that the agent stated that he was willing to take the plaintiff's check in lieu of cash. There was no evidence of any authority of the agent to make any agreement as to the new deed or to make any agreement as to the acceptance of a check instead of cash, nor was there any evidence of a defect in the deed presented by the defendant's agent. The judge found that there was no evidence of any tender by the plaintiff either of a check or cash, and that there was no evidence of a breach of the contract by the defendant. *Held*, that the findings were warranted by the evidence. *Jennings* v. *Howard*, 71.

29. At the hearing of a bill in equity to enforce an agreement in writing made between the plaintiff and the defendant, the only heirs at law and next of kin of their mother, lately deceased, as to the disposition of the mother's estate in a manner different from the way in which it was disposed of by a will left by her, it appeared that the agreement was made in consideration of a promise by the plaintiff not to oppose the probate of the will, which gave practically the entire estate to the defendant. On the day before a petition for the probate of the will was filed, the plaintiff employed a lawyer "to enforce the agreement," and gave him no other authority. The lawyer entered his appearance on the probate petition, and the hearing on the petition was continued. The counsel for the person named as executor in the will thereupon prepared for a contest, but, before the date set for a hearing, the plaintiff's lawyer, concluding that the entry of his appearance was a mistake, withdrew it, and the will was proved without opposition. The judge who presided at the hearing upon the bill in equity found "that the plaintiff did not contest the will, and that he was not estopped by the entry of appearance by" the lawyer "or by any acts done in consequence of that appearance from contending or proving that he did not contest the will." *Held*, that the findings and rulings of the presiding judge were warranted. *Blount* v. *Wheeler*, 330.

30. An electric light company at a stockholders' meeting voted to increase its capital stock. Upon application being made to the board of gas and electric light commissioners under R. L. c. 109, § 24, for its approval of the issue of new stock, that board approved of the issue and, under § 26, ordered that, the fair structural value of the plant appearing to be less than the company's outstanding stock and debt, the company should not declare nor pay any dividend upon its capital stock theretofore issued until at least $3,500 of the indebtedness of the company was cancelled out of its income. The order was not entered on the records of the corporation as required by § 24, the new stock never was issued and six semi-annual dividends thereafter were paid on its stock theretofore issued by the corporation, and were reported by it to the board, who made no objection thereto. Thereafter an agent of persons who desired to purchase the capital stock and assets of the corporation from one who held all its capi-

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tal stock, observing on the record book of the corporation the vote to increase its stock, asked the prospective seller about it, and was told that nothing had been done under the vote, but that the project had been given up; and thereupon the purchase was made. Subsequently the purchasers sought to have deducted from the amount agreed to be paid by them to the seller a sum equal to all of the dividends paid after the order of the board of gas and electric light commissioners was made, contending that the payments were made in violation of the order, and that the seller had made false representations as to the dividends. *Held*, that, the project as to the issue of additional stock having been abandoned, the order as to payment of dividends was inoperative, the seller's statement was accurate, and the deduction sought should not be made. *Childs* v. *Krey*, 352.

Arbitration held not to be required as condition precedent to recovery by owner from contractor for breach of certain building contract, see *ante*, 14.

Case involving questions whether certain statements in writing by architect amounted to approval by him in accordance with terms of building contract, and whether such approval bound the owner, see *ante*, 15.

Consideration of contract in writing for sale and delivery of coal with regard to its construction, waiver of its terms, certain alleged breaches, and what damages could be recovered for such breaches, see *ante*, 8–10, 25–27; EVIDENCE, 4, 15, 17; PRACTICE, CIVIL, 8; DAMAGES, 11.

Building contract for construction of work "subject to acceptance by" owner, a corporation, "and its vice president," held under circumstances to have been performed if vice president, acting as a reasonable man, should have been satisfied, see *ante*, 20.

Contractor has completely performed contract "to fill" two streets and finish them within certain time when he has filled and finished them in workmanlike manner as specified within time set; and fact that afterwards, through no fault of his, surface of streets sank does not preclude recovery, see *ante*, 5.

Action for wages by foreman of yard of municipal board of health discharged in violation of civil service rules, see CIVIL SERVICE, 2.

Whether under circumstances there was waiver of provisions of certain building contract, see *ante*, 19, 21.

Consideration of what was correct rule to apply in assessing damages resulting from breaches of certain building contract, see DAMAGES, 10; and of various evidence bearing on the subject, *ibid.* 8, 9.

One deprived of use of property contrary to provisions of contract is not precluded from recovery in action for breach of contract because property in question commonly is not rented, see DAMAGES, 8.

Auditor in assessing damages for breach of contract is not bound to accept testimony of expert because it is the only evidence on subject, but is not justified in refusing to award any damages merely because he considers estimate of expert "obviously absurd," see DAMAGES, 9.

Action against express company for damages resulting from cars transporting peaches not being iced properly, in which were questions as to whether special contract as to icing was made by consignee or by consignor, and as to effect of contract made, see CARRIER, 5, 6.

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CONVERSION.

Plaintiff in action for conversion of household furniture allowed to give opinion of value of furniture, see EVIDENCE, 5.

In action for conversion of household furniture, expense to which plaintiff was put for attorney's services in seeking to regain possession of furniture allowed as element of damages, see DAMAGES, 12.

Conversion of household furniture by one who had foreclosed mortgage which purported to be given by owner of furniture, but in fact was given without authority by owner's husband, see AGENCY, 2; DAMAGES, 12; EVIDENCE, 5.

At trial of action for conversion of furniture, hypothetical questions were allowed in examination of witness qualified to express opinion on value of furniture like that alleged to have been converted, although witness never had seen articles which were converted, see EVIDENCE, 6.

CORPORATION.

Organization.

1. Under Pub. Sts. c. 105, § 9, now R. L. c. 109, § 13, the persons who hold the franchise or privileges granted to a corporation by a special charter, until the corporation is organized, are the incorporators named in the act of incorporation "and their associate subscribers to stock before the date of the act," and, if at the date of the act no stock has been subscribed for, the persons named in the act are the only persons in whom the franchise rests before the organization of the corporation. *Dobbins* v. *Peabody*, 141.

2. By St. 1855, c. 140, afterwards Pub. Sts. c. 105, § 9, and now R. L. c. 109, § 13, which provides that the persons named in an act of incorporation "and their associate subscribers to stock before the date of the act shall hold the franchise or privileges granted until the corporation is organized," it is necessarily implied that the franchise does not remain in the incorporators as such after the corporation is organized. Where there are no subscribers to the stock before the date of the act of incorporation, the franchise is held by the incorporators named in that act until the corporation is organized, and if such an incorporator refuses to subscribe to the stock and fails to become a stockholder he ceases upon the organization of the corporation to have any interest in its franchise. *Roosevelt* v. *Hamblin*, 127.

3. Under the statute which now is R. L. c. 109, § 13, which provides that the persons named in an act of incorporation "and their associate subscribers to stock before the date of the act shall hold the franchise or privileges granted until the corporation is organized," a corporation is organized within the meaning of the statute when the first meeting has been called and held, the act of incorporation has been accepted, the officers have been elected and by-laws for future meetings have been adopted, at least where there are any stockholders. It does not matter that at the

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time of the meeting only a very small part of the stock of the corporation has been subscribed for. *Roosevelt* v. *Hamblin*, 127.

By-laws.

4. One of the by-laws of a manufacturing corporation organized under the laws of this Commonwealth was as follows: "No sale of any shares of the capital stock of this corporation shall be valid unless the same shall have been offered in writing through the treasurer to the corporation at the lowest price at which the holder thereof will sell the same and five days shall be allowed the treasurer to purchase or decline the same." Certain shares of the corporation were held by a corporation organized under the laws of the State of New York. The last named corporation was consolidated with another New York corporation to form a new corporation, under the business corporation law of New York, which, as amended by St. of New York, 1902, c. 457, provides that, upon the consolidation of two corporations thereunder, "all the property, real, personal and mixed . . . as well as all stock subscriptions and other things in action belonging to either of them, shall be taken and deemed to be transferred to and vested in such new corporation, without further act or deed." The new corporation demanded from the Massachusetts manufacturing corporation a new certificate of shares in its own name, upon the surrender of the old certificate in the name of one of the consolidating companies, without first offering the shares to the manufacturing corporation through its treasurer in compliance with the terms of the by-law quoted above. The manufacturing corporation refused to make the transfer without a previous compliance with its by-law. In a suit in equity by the consolidated company against the manufacturing corporation to compel it to make such transfer and issue a certificate for the shares to the plaintiff, it was *held*, that the defendant should be ordered to issue a new certificate to the plaintiff, the title to the shares having been transmitted to the plaintiff by the operation of the statute of New York proved in the case, and not by a "sale" within the meaning of the by-law, so that the provision of the by-law had no application. *Silversmiths Co.* v. *Reed & Barton Corp.* 371.

Officers and Agents.

Evidence warranting finding that notice was given to corporation by letter addressed to treasurer, see EVIDENCE, 2.

Suit maintained by trustee in bankruptcy of corporation to recover from officer amount paid in excess of reasonable salary, see EQUITY JURISDICTION, 17.

Statement by chief executive officer of corporation in his official capacity upon matter naturally within his personal knowledge admissible in evidence as admission by corporation, see EVIDENCE, 4.

Consolidation.

Case involving determination of question whether transfer of shares of capital stock of Massachusetts corporation by one New York corporation to

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another, formed on reorganization of former, violated by-law of Massachusetts corporation making any sale and transfer of its shares invalid unless first they have been offered to it through its treasurer, see *ante*, 4.

Transfer of Shares.

Question whether transfer of shares of capital stock of Massachusetts corporation by one New York corporation to another, formed on reorganization of the former, violated by-law of Massachusetts corporation making any sale and transfer of its shares invalid unless first offered to it through its treasurer, see *ante*, 4.

Rights and Liabilities of Stockholder.

Stockholder in national bank who does not assent to extension of period of succession and does all he can under U. S. St. 1882, c. 290, § 5, to have his shares appraised and their value paid to him, ceases to be liable as stockholder in action by receiver under U. S. Rev. Sts. §§ 5151, 5234, see NATIONAL BANK.

Publication in newspaper of fair report of proceedings at business meeting of stockholders of private corporation not privileged, and, if in publication there are libellous remarks made by stockholder, newspaper is liable in action for libel, although remarks related to matter in which stockholders had interest, see LIBEL AND SLANDER, 2.

Public Service.

See PUBLIC SERVICE CORPORATION.

COVENANT.

In lease, see LANDLORD AND TENANT, 7.

DAMAGES.

For Property taken or injured under Statutory Authority.

1. One, whose property is depreciated in value through interference with light, air and prospect by retaining walls built by a railroad company upon its own land in the abolition of a grade crossing, has no remedy at common law. *McKeon* v. *New England Railroad*, 292.
2. Interference with light, air and prospect by a railroad company in the abolition of a grade crossing of the railroad with a public way does not constitute such a taking of an easement in the land so interfered with as, without more, will support a petition for damages under St. 1906, c. 463, Part I. § 37. *Ibid.*
3. A demurrer to a petition under St. 1906, c. 463, Part I. § 37, for damage resulting to the petitioner by reason of depreciation of the value of real estate of the petitioner, abutting on a railroad, through interference with light, air and prospect by a retaining wall built on its own land by a railroad company in the abolition of a grade crossing, will be sustained if

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the petition contains no allegation that there was a taking of land or of an easement in land, or a change or discontinuance of a private way by the company in the course of such abolition. *McKeon* v. *New England Railroad*, 292.

4. *It seems*, that, if a petition under St. 1906, c. 463, Part I. § 37, for damages resulting to land of the petitioner from the abolition of a grade crossing of a railroad with a highway contains an allegation that in the course of such abolition some land or an easement in land was taken, or that a private way was changed or discontinued, whereby the petitioner suffered special and peculiar damage, it is not necessary to allege that land or an easement in land of the petitioner was taken, or that a private way of his was changed or discontinued. *Ibid.*

5. Upon a petition for damages for the taking of waters under St. 1894, c. 78, an act to supply the town of Rockport with water, § 4 of which provides that "no application for the assessment of damages shall be made for the taking of any water, water right, or any injury thereto, until the water is actually withdrawn or diverted by said town under the authority of this act," interest must be computed upon the amount of damage, if any, from the time when the waters actually were diverted, and a delay in the trial of the case after the filing of the petition, when either party could have brought it up for trial, is no reason for computing the interest from any later date. *Dodge* v. *Rockport*, 274.

6. In an action of tort against a city for an alleged unlawful diversion of the water of a brook, the plaintiff cannot recover the compensation to which he is entitled under a statute authorizing the defendant to take the water of the brook for a water supply. *Bryant* v. *Pittsfield*, 530.

7. Damage, resulting to the owner of land from the erection of temporary bridges over it by a railroad company and from the running of trains thereon during the work of abolishing a grade crossing, cannot be recovered by petition under St. 1906, c. 463, Part I. § 37. The owner's remedy, if any, is in tort. *McKeon* v. *New England Railroad*, 292.

Damages allowed for taking of water rights of owner of tide mill in Mill River for construction of waterworks for Rockport under St. 1894, c. 78, § 4, see WATERCOURSE, 2, 3.

In Contract.

8. One who has been deprived of the use of his property contrary to the provisions of a contract, in suing for damages in an action of contract, is not precluded from recovering because the property in question commonly is not rented. *C. W. Hunt Co.* v. *Boston Elevated Railway*, 220.

9. An auditor in assessing damages for a breach of contract is not bound to accept the testimony of an expert because it is the only evidence on the subject, but he is not justified in refusing to award any damages merely because he considers the estimate of the expert "obviously absurd." If he thinks the estimate too large, he can cut it down to the proper amount. *Ibid.*

10. In an action by a street railway company, which was erecting on a wharf belonging to it a large pocket for the storage of coal to be brought

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to the wharf in vessels, for alleged breaches of a contract in writing to construct for the plaintiff, by a date named and in accordance with certain specifications, two hoisting towers for hoisting coal from the vessels to the top of the pocket, it appeared that one of the towers was not completed until more than nine months after it was required by the contract to be "completed and in working order" and that the other tower was not completed until about a month and a half later. Of these two periods of delay an auditor found that seven months in each case was the "inexcusable delay" of the defendant. It further appeared that during a portion of the period of delay there was a coal famine at the port in which the plaintiff's wharf was situated owing to a strike at the coal mines. The master did not find what portion of the period of delay was covered by the coal famine and the strike. The plaintiff had a power station at its wharf which used four thousand tons of coal a month, and had a storage capacity of three thousand tons, in addition to that of the coal pocket. The auditor found that the damages "were all attributable to the coal strike, which came without warning like a flood or tornado." He found and ruled that the damages suffered by the plaintiff were attributable to the coal strike and not to the failure of the defendant to perform its contract, and ruled that the plaintiff was not entitled to recover any damages. *Held*, that the ruling of the auditor that the plaintiff was entitled to no damages was wrong, and that the case must be recommitted to him for further hearing on the damages suffered by the plaintiff from the defendant's inexcusable delay of seven months; that the direct damage suffered by the plaintiff was the loss of the means of economical operation which the use of the towers would have furnished; that during the period of delay the plaintiff lost all return on the money previously paid by it in part payment for the towers, all use of its wharf and the adjoining dock and all use of its investment in the coal pocket and other structures erected by it for use in connection with the towers; that the expense of demurrage, which had to be paid to get coal loaded during that portion of the seven months while there was a strike or the effects of the strike lasted, might have been incurred reasonably by the plaintiff in discharging coal at another wharf, instead of discharging it at the plaintiff's wharf which had been rendered useless by the coal towers not being in working order through the inexcusable delay of the defendant; that the fact, that the delay was caused by a strike which came "like a flood or a tornado" in no way excused the defendant from paying the damages ensuing from his breach of contract; and that the fact that the price which the plaintiff had to pay for the equivalent of its wharf during the time of the strike was exceedingly high because of the strike did not deprive the plaintiff of the right to recover it as damages. *C. W. Hunt Co.* v. *Boston Elevated Railway*, 220.

11. In an action for the alleged breach of a contract in writing for the sale and shipment at a port named of a certain amount of coal in each month during a specified period, where it is admitted by the defendant that the plaintiff was bound to have vessels at certain piers at the times when the defendant ought to have delivered the coal, if it appears that the defendant did not supply coal for these vessels to the extent and at the times required

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by the contract, the plaintiff is entitled to recover as an element of his damages any payments for demurrage, incurred by him under reasonable contracts with the owners of vessels, which are found to have been a direct and natural consequence of the defendant's failure to furnish the coal on time. *Garfield & Proctor Coal Co.* v. *Pennsylvania Coal & Coke Co.* 22.

In Tort.

12. At the trial of an action of tort for the alleged conversion of household furniture of the plaintiff, it appeared that the defendant, assuming to act under a mortgage which purported to be but was not signed by the plaintiff, and of which the plaintiff had no knowledge, had taken possession of and sold the furniture and refused to return it to the plaintiff, that the plaintiff thereupon had employed an attorney at law to regain the furniture, and finally procured it by paying under protest the amount demanded by the defendant. *Held*, that the expense to which the plaintiff was put for the attorney's services constituted a proper element of damage so far as it was reasonable and proper. *Berry* v. *Ingalls*, 77.

At trial of action for conversion of shop furniture, witness with knowledge of shop furniture like that for conversion of which action is brought can be examined on subject of value of converted furniture by hypothetical questions, although he never has seen furniture which was converted, see EVIDENCE, 6.

Interest.

See INTEREST.

Recoupment.

Liquidated damages in recoupment allowed to owner under terms of certain building contract without previous submission to arbitration, see CONTRACT, 14. Also questions regarding whether any, and if any, how much damages should be allowed in recoupment to owner for other breaches of contract by contractor, see *ibid.* 15–18.

DEED.

Construction.

A deed made by one L. S. recited that it was in consideration of $1,000 paid by C. S., the son of the grantor, and remised, released and forever quitclaimed unto the said C. S. his heirs and assigns certain parcels of land with the buildings thereon. After the description the deed proceeded as follows: "Reserving to myself the right at any and all times to cut and remove from any and all said tracts so much of the wood and timber growing thereon as I shall from time to time see fit and retain the same to my own use. To have and to hold the aforegranted premises to the said C. S. during the term of his natural life remainder to such of the children of said C. S. as shall arrive at the age of twenty-one years their heirs and assigns, to their use and behoof forever. So that neither I the said L. S. nor my heirs, nor any person or persons claiming from or under

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me or in the name, right or stead of me or them by any way or means, have any estate, right title or interest of in and to the aforesaid premises with the appurtenances except as aforesaid." C. S. died leaving five children, of whom two were of age and three were minors. *Held*, that the deed did not create a contingent remainder in such children of C. S. as should arrive at the age of twenty-one years, but expressly declared the intention of the grantor to part with all his interest in the property except the reservation of the right to cut wood, and that the intention of the grantor would be carried into effect by treating the deed as a conveyance to uses, that the fee vested in C. S. and his heirs, first for the use of himself during his life, and then for the use of such of his children as should attain the age of twenty-one years, and that, when all of this class had been determined finally, the use would shift to them in fee and be executed by the statute of uses. *Held*, *also*, that the word "remainder" in the habendum clause did not prevent this construction of the deed, the whole clause taken together showing that the word was not used in its technical sense. *Simonds* v. *Simonds*, 552.

Construction of certain deeds with reference to whether they contained provision for private right of way, or for light and air, see EASEMENT, 1, 2; suit to restrain infringement of such alleged way and easement, see EQUITY JURISDICTION, 22.

DEVISE AND LEGACY.

A testatrix, who at the time of her death was sixty-eight years of age and never had been married, owned but one piece of real estate, upon which were two tenement houses so built that a line which would divide the land through the middle from front to rear would lie wholly between the houses. This real estate was subject to a mortgage which, together with the other debts of testatrix, her personal property was insufficient to pay. The will bequeathed to two nephews $100 each, to a niece C. a diamond ring, to a niece E. a gold watch and chain, to two brothers all money which she had after the legacies were paid and to one of such two brothers "all the rest and residue of my personal property of every description." She devised to her niece C. "one undivided half of all the real estate of which I am now or of which I may hereafter die seised or possessed or be in any manner entitled at the time of my decease" and devised "the rest residue and remainder of my real estate of which I am now, or of which I may hereafter die seised or possessed, or be in any manner entitled at the time of my decease" to trustees for the benefit of her niece E. *Held*, that the will exhibited no intention on the part of the testatrix to make the devise to C. subject to the mortgage, and that therefore it should not be so subjected until after the personal property and the other half of the real estate, which had been devised in trust for E. by the residuary clause, had been exhausted. *Hayward* v. *Hayward*, 340.

Whether words in will, "their three children," under certain circumstances should be construed to mean "my three grandchildren," see PROBATE COURT, 2.

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DISTRICT, POLICE AND MUNICIPAL COURTS.

Powers of court as to placing on file complaint for commission of crime, and as to dismissing case where defendant has been on probation and object of probation has been accomplished, see PRACTICE, CRIMINAL, 7, 8.

EASEMENT.

1. By describing land in a deed as bounding on "an open court," which belongs to the grantor, and granting a right of way "in along or over" such court and certain passageways connecting therewith, no easement of light and air over the court is created, where it does not appear that at the time of the conveyance such an easement was indispensable for the reasonable enjoyment of the land conveyed. *Lipsky* v. *Heller*, 310.

2. One owning land in a city divided it into five lots as shown on a plan, two of the lots and the rear portions of the others being accessible from a public street only by the use of passageways and an open space or court designated on the plan. He made separate deeds of four of the lots designating each by reference to the plan, which was recorded in the registry of deeds. The deeds of three of these lots granted a right of way in, along or over the court and passageways to a public street in common with others having a like easement or to whose estates such rights were granted as appurtenant, and in two of these deeds the open space was referred to as "a court" or "an open court." The open space was at the back of the fourth lot, and the deed of that lot described it as "subject to a right of way . . . in and over the passageway and open court, on the northerly and easterly sides appurtenant to the other estates designated on said plan." Later the same grantor sold and conveyed the fifth lot by deeds containing no effectual reference to the plan or the easement. *Held*, that the grantor by his deed of the fourth lot, making it subject to the right of way as described above, excepted such easement for the benefit of the fifth lot which he then owned, that being one of the "other estates designated on said plan" to which the right of way was appurtenant. *Ibid.*

Interference with light, air and prospect by railroad company in abolition of grade crossing is no ground for recovery of damages by landowner unless in course of abolition some land or easement in land was taken or private way changed or discontinued, see DAMAGES, 1–4.

ELEVATOR.

Action by tailor's boy against owner of students' dormitory for personal injuries resulting to plaintiff from sudden starting of elevator in dormitory as he was entering it, see NEGLIGENCE, 23, 24.

EMINENT DOMAIN.

It is within the power of the Legislature to authorize a taking of property under the right of eminent domain without the use of any writing by an

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act *in pais* which purports to be done under the authority of the statute and which clearly indicates an intention permanently to appropriate the designated property to a public use. *Bryant* v. *Pittsfield*, 530.

EMPLOYERS' LIABILITY ACT.

In a notice to an employer of the time, place and cause of an injury required by R. L. c. 106, § 75, for the maintenance of an action under the employers' liability act, an averment of the negligence of the defendant in a matter stated includes not only personal negligence of the defendant but also negligence of a superintendent in his employ, and under it negligence of either or both of them may be proved. *Berube* v. *Horton*, 421.

Manufacturing corporation using locomotive in its yard is liable to its employees under R. L. c. 106, § 71, cl. 3, for injuries received by them by reason of negligence of person in charge thereof, see NEGLIGENCE, 5, 6.

Provision of R. L. c. 106, § 75, that actions under §§ 71–73 must be brought within one year after accident which causes injury to employee is condition precedent to bringing of action and non-compliance with it can be shown in defense under answer of general denial, see PLEADING, CIVIL, 4.

EQUITABLE RESTRICTION.

Bill in equity to restrain use of building as garage on property subject to restriction against any use or business "offensive to the neighborhood for dwelling houses," see EQUITY JURISDICTION, 1.

EQUITY JURISDICTION.

Laches.

1. In three suits in equity to enjoin the maintenance by the defendant of a garage in his building on Newbury Street in Boston in alleged violation of restrictions to which his land was subject, it appeared that the rights of the plaintiffs against the defendant, apart from the question of laches, were in all material respects the same as those of the plaintiff in the case of Evans v. Foss, 194 Mass. 513, in which an injunction was granted on the ground that the construction of this garage would be a violation of the restriction that no building erected on the land should be used or occupied for any business which should be "offensive to the neighborhood for dwelling houses." On the question of laches it appeared, that these suits were not brought until after the garage was completed and in operation, the plaintiffs having relied for protection on the injunction obtained by Evans, who in the meantime had sold his land to the defendant and had consented to a decree dismissing his bill. The justice who heard the case found that the defendant in completing the garage was not misled by the conduct of the plaintiffs into the belief that they and others similarly situated acquiesced in what he was doing, that the defendant did not act in good faith in reference to the rights of the plaintiffs, but pushed forward the erection of the garage with the intention of buying the land of Evans

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if the defendant should be unsuccessful in the suit brought by Evans, in the hope, that if the defendant completed the garage before other householders made objections, he would not be enjoined by the court from using the building as a garage, that the defendant purposely abstained from ascertaining whether other householders on the street objected to the garage, fearing that if he asked questions objections would be made, that the defendant after the decision against him bought Evans's house and land and caused the deed to be taken in the name of his clerk instead of in his own name, in part for the purpose of concealing the purchase from the owners of the other houses on the street, that for the same purpose he withheld the deed from record for more than two months, and that all this was done in the hope that, if objections were made, the later they were made the better his position would be in proceedings to enjoin him from using the building as a garage. *Held*, that there was no laches on which the defendant had a right to rely as a bar to the plaintiffs' suits, and that the injunctions prayed for should be granted. *Daly* v. *Foss*, 104.

Long acquiescence in acts of grantee of land, treating it as his own, although it was alleged to have been originally conveyed to him as security only, held to be laches which barred suit by grantor to redeem land, see *post*, 12.

Failure of beneficiary to terminate resulting trust in real estate determinable at his pleasure is not laches which will bar bill by executor to enforce it after his death, see TRUST, 8.

Adequate Remedy at Law.

Remedy of one to whom gas company in violation of R. L. c. 58, § 17, refuses to furnish gas, is not by bill in equity, since there is adequate remedy at law by petition for writ of mandamus, see GAS COMPANY, 2.

No Aid in establishing Title acquired for Unlawful Purpose.

2. In a suit in equity by a married man against a single woman to establish the plaintiff's title to household furniture used in an apartment in which the plaintiff and the defendant had been living together, if it is found by a master, on evidence not reported, that the defendant bought the furniture with money supplied to her by the plaintiff for the purpose of inducing her to become and remain his mistress and that she did so become and remain, and that the furniture so bought was not bought or used for any lawful purpose but was intended and used by the parties to surround and guard their intercourse with a setting of safety, seclusion and ease, the court will not consider whether the plaintiff has any title to the furniture, as, even if he has, the court will not aid him to secure the title to or possession of property which was a part of the price of such unlawful conduct, but will leave the parties in the position in which they have placed themselves. *Otis* v. *Freeman*, 160.

Specific Performance.

8. A master, to whom was referred a suit in equity against a corporation and an inventor to compel the corporation to assign to the plaintiff certain

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letters patent, and to enjoin the defendants from manufacturing or selling machines covered by such letters patent, found that the inventor formerly had owned letters patent covering a certain type of machine, and had applied for the letters patent, which were the subject of the suit, and which were upon an improvement on the original machine, that, after the original patent had expired and while the application for the patent upon the improvement was pending, he in writing assigned to the plaintiff all his "right title and interest" to the original patent, and "all further improvements thereon and renewals of the aforesaid patent," and the assignment duly was recorded in accordance with the national patent law. Thereafter the letters patent, which were the subject of this suit, were issued to the inventor, and he assigned them to the defendant corporation. The defendants moved to dismiss the bill on the ground of lack of jurisdiction in the State court, contending that, under U. S. Rev. Sts. § 711, cl. 5, the United States courts had exclusive jurisdiction, because the bill presented "a question involving an inquiry as to the construction and scope of the patents therein mentioned," namely, the question whether the later patent was for an "improvement" upon the machine formerly patented. The motion was denied and the defendants appealed. *Held*, that the motion was denied properly, since the suit related to the construction and enforcement of an instrument transferring rights under letters patent, and of such a suit the jurisdiction of the United States courts is not exclusive. *Marshall Engine Co.* v. *New Marshall Engine Co.* 546.

4. A widow, who for ten years had been estranged from her daughter, died, leaving a will which gave specific legacies of small amounts to various persons, $5 to the daughter, and the residue of the estate to a son, who was the only other heir at law or next of kin. The estate was personalty. Upon the daughter's stating in good faith that she intended to contest the probate of the will, the son and she, before the will was examined by either and before it was offered for probate, agreed in writing "in settlement . . . that [the daughter] will have one third of the estate and [the son] will have two thirds." The will thereupon was proved without a contest and a third person named therein appointed executor, and, the son refusing to carry out the agreement, the daughter, by a bill in equity against the son and the executor, sought to compel its performance. *Held*, that the bill might be maintained and the agreement specifically enforced; and, *also*, that such a suit was not an interference with the settlement of the estate in the Probate Court. *Blount* v. *Wheeler*, 330.

As to other questions which arose in the above suit, see CONTRACT, 1, 3, 11, 29.

Fraud.

5. In a suit in equity by the daughter of a man, who had died leaving life insurance under a policy which originally had been payable to the plaintiff as beneficiary, against the executor of the will of the widow of the insured, alleging that the defendant's testatrix had falsely represented to the plaintiff's father that she was an unmarried woman and thereby had induced him to marry her and to make the policy of insurance payable to her instead of to the plaintiff, the judge who heard the case ordered that the

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bill be dismissed, and, the case coming before this court on appeal without any ruling of law or findings of facts having been asked for, it was *held*, that, as the facts disclosed by the record warranted a finding by the judge that there was no fraud on the part of the defendant's testatrix, it was unnecessary to consider whether, if the substitution had been brought about, as alleged, by fraud on the part of the defendant's testatrix, the plaintiff would have had any such vested right as beneficiary under the policy as to entitle her to maintain the bill. *Drake* v. *Elliot*, 327.

Accounting.

6. In a suit in equity by one of the partners of a dissolved firm against his former copartners for an accounting, if it appears that on the termination of the partnership the defendants wrongfully appropriated to their own use the whole property of the partnership including the good will and continued to carry on the same business using the firm name without change, the plaintiff's right to an accounting for his share of the good will is not affected by the fact that, if the good will of the old firm, including the right to use the firm name to show succession, had been sold to other persons, the defendants might have used the same name to designate a new firm. *Moore* v. *Rawson*, 493.
7. In a suit in equity by one of the partners of a dissolved firm against his former copartners for an accounting, if it appears that on the termination of the partnership the defendants wrongfully appropriated to their own use the whole property of the partnership including the good will and continued to carry on the business as their own, and if among the assets of the firm taken into possession by the defendants there was a list of the customers of the firm, the defendants are bound to account to the plaintiff for the use of this list and the enjoyment of business derived from its use. *Ibid.*
8. By a dissolution under the terms of a partnership agreement one of the partners was forced by the other partners to retire, and the remaining partners refused the retiring partner an accounting, and, forming a new partnership in which they took an additional partner into the firm, continued the business, using the retired partner's share in the property and good will of the old firm as a part of their working capital. In a suit by the retired partner against his former copartners for an accounting, this court held that the defendants must account to the retired partner, not only for his share of the partnership property including the good will, but also for his share in all the actual profits derived from the property, or must pay him interest on his share of the capital, if he should so elect. In ordering that the case should be recommitted to the master, this court intimated that, in computing the actual profits in which the plaintiff was entitled to share, such a sum might be deducted from the net profits as the master should find was attributable solely to the skill and services of the defendants. The plaintiff elected to take his share of the profits instead of interest on his money. The master, to whom the case was recommitted, reported that the evidence did not enable him to determine

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how much, if anything, should be allowed to the defendants as compensation for their services. *Held*, that, on all the facts of the case, the culpability of the defendants was not so great as to leave them with no right to compensation for their services, and that they equitably were entitled to an allowance, that, although the evidence did not give a precise standard for the measurement of the value of the defendants' services, it showed that something should be allowed to them, and that it was the duty of the master to determine what was a reasonable compensation, that, by fixing a fair price for such services in ordinary cases, it would be possible to determine whether, in view of the results of the business, more or less than the usual compensation should be allowed as the part of the income that ought to be attributed to the services of the partners as distinguished from the part which was earned by the capital of the partnership, and that for this purpose the services of the new partner should be treated as if rendered by the defendants. It was ordered that the case again should be recommitted to the master to determine what allowance should be made to the defendants for their skill and services and to state the account accordingly. *Moore* v. *Rawson*, 493.

9. One, who, at the request and for the benefit of the mortgagor and owner of the equity of redemption of certain real estate, purchased the real estate at a sale made in foreclosure of the mortgage for $8,000, taking the title in his own name, afterwards with the mortgagor's consent procured a loan of $6,000 for which he gave his note bearing interest at four per cent and secured by a new mortgage upon the property. Subsequently, at a time after such purchaser had made several payments of interest upon the new mortgage note, the original mortgagor by a bill in equity sought from him an accounting and reconveyance of the property, subject to the new mortgage. A master to whom the suit was referred charged the plaintiff in the accounting with interest at the rate of six per cent upon the $8,000 which the defendant paid for the property at the foreclosure sale, and also with the payments of four per cent interest which the defendant had made on the new mortgage, but credited the plaintiff with but four per cent interest on the $6,000 which the defendant had received on the new mortgage; and the plaintiff excepted. *Held*, that the exception must be sustained, since the defendant received the $6,000 to his own use and therefore should be charged and the plaintiff credited with six per cent interest thereon. *O'Brien* v. *McNeil*, 164.

10. From the report of a master to whom a bill in equity for an accounting had been referred, it appeared that on January 1, 1902, a third person held a promissory note of the plaintiff dated August 6, 1901, for $10,989.38, payable three months after its date and bearing interest payable monthly from July 8, 1901, at the rate of eight per cent per annum, that the note was secured by collateral upon which the holder was threatening to foreclose, and that, at the request of the plaintiff, the defendant paid to the holder of the note on January 16, 1902, the sum of $11,528.62 and took the note by indorsement and the collateral, to secure repayment to him of the amount then advanced for the plaintiff. The report did not state how the sum of $11,528.62 was made up. In the statement of the account

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the master charged the plaintiff with the principal amount of the note and with interest thereon at the rate of eight per cent from the date of the note to a date after that on which the defendant took up the note for the plaintiff, and also charged the plaintiff with "Amount advanced by the defendant to the plaintiff in excess of" the note, $539.24. The plaintiff excepted to the last named item, contending that it appeared from the report that the plaintiff was thus charged twice with interest upon the amount of the note. *Held*, that the exception should be sustained. *O'Brien* v. *McNeil*, 164.

11. A master, to whom was referred a bill in equity for an accounting and reconveyance brought by one, who had been the mortgagor and owner of the equity of redemption of certain apartment house property against one, who, at his request and for his benefit, had purchased the property at foreclosure sale, ruled that the defendant stood in the position of a mortgagee in possession, and the plaintiff in that of a mortgagor seeking to redeem, found that certain payments by the defendant for the premises for new heating apparatus, new window screens, and new receptacles for garbage and ashes were necessary and proper, and that an alteration in the front of the building, which changed a window into a door with steps so that the front room could be used for a small store, was not a damage to the estate, but enabled the defendant to rent the property continuously at an advanced rent. There was no finding in terms as to whether the alteration was or was not beneficial, but the master reported at length as to the nature of the surrounding real estate. The account charged the plaintiff with the defendant's outlay for the above purposes. *Held*, that on the facts reported it did not appear that the finding of the master in making the charge was wrong. *Ibid.*

Determination of whether and from what time interest should be allowed in suit for accounting, where plaintiff claims unliquidated deductions from liquidated amount which he admits to be due to defendant from him, see INTEREST, 1.

Suit in equity for accounting brought by agent for foreign countries of manufacturing corporation in United States, involving question of whether, in selling to corporation upon ceasing to act as agent, on its promise to account to him for its value, the "good will" of his business, plaintiff sold anything for which defendant should account, see GOOD WILL.

Suit in equity by inventor against manufacturer of invented article for accounting for net profits, see CONTRACT, 6, 7.

Trust.

Suit in equity for accounting brought by one who formerly had owned equity of redemption of certain property which, at his request and for his benefit, defendant had purchased at foreclosure sale, involving questions of interest and of allowances proper to be credited to defendant for disbursements for benefit of property, see *ante*, 9–11.

Bill in equity to enforce resulting trust by executrix of one who purchased real estate and had title conveyed to one from whom, by mesne con-

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veyances, all holders of the title having notice of facts, it came to the defendant, see TRUST, 2–9.

Suit in equity to compel one, to whom it was alleged trustee had assigned mortgage when he had no power to do so, to reconvey property to new trustee, dismissed on appeal because on facts it appeared that trustee had not assigned, but had discharged mortgage, see MORTGAGE.

Partnership.

Suit in equity by one who, by compulsory dissolution of partnership of which he was member, had been forced to retire, against former partners for accounting, and questions raised therein, see PARTNERSHIP, 1–4; *ante*, 6–8.

Patent.

Jurisdiction of State court with regard to construction and enforcement of instrument transferring rights under letters patent, see *ante*, 8.

To redeem Land conveyed as Security by Deed absolute in Form.

12. One who was the owner of a two sevenths interest in the real estate of a deceased person and was the administrator of his estate, becoming heavily indebted to the owner of the other five sevenths interest in the real estate, who had trusted implicitly to his management, in 1868, without the knowledge of the latter but acting as his agent, conveyed to him his two sevenths interest by deed absolute intending that it should be security for the amount owed to the grantee. The value of the property conveyed was less than the amount of the debt owed. In 1876 the grantor had put himself in a position where he could contend either that the property was held by the grantee as security, or as payment *pro tanto* of the debt. In that year the grantor in an account to the grantee credited himself with the value of the real estate conveyed as payment *pro tanto*, and in his schedule in voluntary bankruptcy proceedings, filed in the same year, did not include the equity in the land as his own, and scheduled as the debt due to the grantee such balance as would have been left if the land had been applied as payment *pro tanto*. The grantee thereupon took entire management and control of the land and sold part of it, and the grantor acquiesced therein until 1903. In 1905 the grantor by a bill in equity sought to have the conveyance of 1868 declared to be in security for a loan, and to redeem the property therefrom. *Held*, that the bill should be dismissed, both because the understanding of the parties in 1876 that the land should be applied as a part payment of the debt relieved the conveyance from the agreement that the land should be treated as security for the debt, and also because the plaintiff through his long acquiescence was barred by laches. *Sears* v. *Gilman*, 384.

To recover Property conveyed as Preference by Bankrupt.

13. From evidence before him at the hearing of a suit in equity by the trustee in bankruptcy of a corporation against one who had been president, treasurer, general manager and a member of the board of directors

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of the corporation, to recover the value of property alleged to have been conveyed to the defendant by the corporation as a preference under § 60, a, b, of the bankruptcy act of 1898, as amended by U. S. St. 1903, c. 487, a master to whom the suit had been referred found that, without evidence which was introduced before him of the value assigned to the corporation's assets by appraisers appointed in the bankruptcy proceedings, and of the amount for which a receiver who was appointed in those proceedings had sold the assets to the defendant, the probative weight of which evidence he found was "light," he would "not have found that the corporation was insolvent" at the time the alleged preference was made, or that the defendant had reasonable cause to believe it to have been insolvent and that it intended to give him a preference; but he also found that, at the time the conveyance was made, the defendant had reasonable cause to believe that the corporation was insolvent and intended to prefer him, since a state of things then existed and then was known by the defendant, which, if known by a business man of ordinary prudence and intelligence, would have caused him to believe that the corporation was insolvent and intended to give a preference. And he ruled that the defendant should return to the plaintiff the value of the property conveyed. *Held*, that, upon the facts found, there was no error in the ruling. *Atherton* v. *Emerson*, 199.

14. One who was president, treasurer, general manager and a member of the board of directors of a corporation, and also was engaged in a business similar to that in which the corporation was engaged, was, at a time within four months of the filing of a petition to have the corporation adjudged bankrupt, (upon which an adjudication afterward was made,) an indorser upon notes of the corporation and knew that the corporation was insolvent, but, knowing that the corporation intended to prefer him, he accepted from the corporation a deed of certain of its property and of its book accounts, which purported to be in consideration of loans to be made in the future, but which was made in part at least to secure past indebtedness of the corporation to him. He also received in the same period and under the same circumstances payments of balances due him from the corporation in excess of what he owed it. In a suit in equity brought against him by the trustee in bankruptcy of the corporation to recover the value of the property thus conveyed, the amount collected on the book accounts, and the payments to him on his account with the corporation, it was *held*, that the transactions were preferences under § 60, a, of the bankruptcy act of 1898 as amended by U. S. St. 1903, c. 487, and that, under § 60, b, the trustee might avoid them, and recover from the defendant the value of the property of the corporation thus conveyed and paid to the defendant. *Ibid.*

15. One who was the president, treasurer, general manager and a member of the board of directors of a corporation, an indorser upon a promissory note of which it was the maker and a guarantor of certain of its bills payable, knowing that the corporation was insolvent and that it intended, in preference to other creditors, to relieve him from his liability as such indorser and guarantor, himself as treasurer of the corporation paid the

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note at its maturity and the account which he had guaranteed, at a time within four months of the filing in the bankruptcy court of a petition that the corporation be adjudged bankrupt, upon which an adjudication afterwards was made. Neither the payee of the note nor the creditor thus paid had reason to believe that a preference was intended by the payment. *Held*, that such payments were preferences within the meaning of § 60, a, of the bankruptcy act of 1898, as amended by U. S. St. 1903, c. 487, and that, under § 60, b, the trustee in bankruptcy could recover in a suit in equity against the indorser and guarantor, as one who was "benefited thereby," the amount of the payments. *Atherton* v. *Emerson*, 199.

16. In a suit in equity by the trustee in bankruptcy of a corporation against one who had been its president, treasurer, general manager and a member of its board of directors, to recover the value of certain alleged preferences received and profits made by him in violation of his official duties, it appeared that, at a time within four months of the filing of the petition in bankruptcy, the defendant, knowing of the corporation's insolvency, purchased a claim from a creditor at less than its face value, and then as treasurer paid himself its full face value. A master to whom the suit was referred ruled that the plaintiff could recover, but that his recovery was limited to the profits the defendant made on the transaction, and both the plaintiff and the defendant excepted. *Held*, that both exceptions must be overruled, since the master might have found that the defendant in purchasing the claim was acting as agent of the corporation; *but*, that, if the master had found that in making the purchase the plaintiff had been acting for himself and not on behalf of the corporation, the entire amount paid to him in settlement of the account might have been recovered by the plaintiff as a preference under § 60, a, b, of the bankruptcy act of 1898 as amended by U. S. St. 1903, c. 487. *Ibid.*

Certain rulings as to evidence by master before whom was tried suit in equity by trustee to recover property conveyed as fraudulent preference by bankrupt, see EVIDENCE, 12, 13.

To recover Excessive Salary paid to Officer of Corporation.

17. A master, to whom was referred a suit in equity brought by the trustee in bankruptcy of a corporation against one who was its president, treasurer, general manager and a member of its board of directors, to recover an amount of money alleged to have been paid to the defendant as salary in excess of the fair value of the services of the defendant to the corporation, found that, by a vote of the directors of the corporation shortly after its organization, the defendant was to receive annually as salary a sum equal to $5,000 and six per cent of the amount of capital invested by him, and that the other officers were to receive as their salaries certain amounts and like percentages of the capital invested by them; that subsequently, as from time to time he acquired additional shares of the capital stock of the corporation, the directors voted to the defendant as additions to his salary amounts equal to six per cent of the par value of the stock thus acquired

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by him; that a fair value of the services of the defendant to the corporation was $5,000; that the corporation never had declared any dividend, *eo nomine*. *Held*, that the plaintiff was entitled to recover all sums in excess of $5,000 per year paid to the defendant as salary, *but* that it could not be ruled as a matter of law that such voting of salaries amounted to a declaration of a dividend. *Atherton* v. *Emerson*, 199.

To enjoin Public Officer.

18. A bill in equity will lie to enjoin a public officer from taking action injurious to the plaintiff's rights of property under a statute which is unconstitutional. *Moneyweight Scale Co.* v. *McBride*, 503.

19. A suit in equity cannot be maintained to enjoin a public officer from deciding a question committed by statute to his decision on the ground that he threatens to come to a wrong conclusion. If in deciding the question he should proceed on erroneous principles of law, his decision could be quashed on certiorari, or in some cases a writ of mandamus might issue directing him to take specific action, but this court has no jurisdiction to take from him the duty of deciding the question. *Ibid.*

Contempt in Violation of Injunction.

President and temporary secretary held not to have been proved to have violated injunction against interference on their part with certain contractors, see UNLAWFUL INTERFERENCE, 7.

To "remould," reform or correct Will.

No jurisdiction in equity to "remould," reform or correct instrument already admitted to probate as will, see PROBATE COURT, 1, 2.

To restrain Unauthorized Use of Property by Agent of Plaintiff.

20. A client, for whom an attorney at law has recovered money which he retains in his hands, may maintain a suit in equity against the attorney to enjoin him from using the money in paying more than the plaintiff thinks is due in settling physicians' bills against the plaintiff. *Falardeau* v. *Washburn*, 363.

21. In a suit in equity against an attorney at law, who has recovered money for the plaintiff which he retains in his hands, to enjoin him from using the money in paying more than the plaintiff thinks is due in settling physicians' bills against the plaintiff, if it appears that the defendant was given an opportunity by the judge who heard the case to have the physicians summoned into court in order that he might establish the amount of his lien on the money in his hands for personal liability incurred for their bills, and did not elect to have them made parties, he cannot rely on such lien in defense, as he has no right to retain the plaintiff's money in his hands indefinitely for the purpose of settling these bills, and has lost his lien through his own fault in not taking the proper steps to enforce it. *Ibid.*

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To restrain Infringement of Easement.

22. In a suit in equity by the respective owners of two lots of land upon a city street abutting in the rear upon an open court constituting the back portion of a lot of land belonging to the defendant fronting on the same street between the lots of the two plaintiffs, to restrain the defendant from extending his building over the open space or court in which the plaintiffs claimed rights of way and easements of light and air, it appeared that all of the lots formerly had belonged to the same person, who divided the land into these lots according to a plan recorded in the registry of deeds, that in the deeds the lots of the plaintiffs were bounded upon the open space described as "a court" or an "open court," that the land of the defendant was made "subject to a right of way . . . in and over the passageway and open court, on the northerly and easterly sides appurtenant to the other estates designated on said plan," that the court was connected with a public street by a passageway under the defendant's building, and that another passageway led from the other end of the court along the rear of the lot of one of the plaintiffs. There were no words in the deeds creating an easement of light and air and it did not appear that at the time of the conveyances to the plaintiffs such an easement was indispensable for the reasonable enjoyment of the land conveyed, and it was held that no such easement was created. A master to whom the case was referred found, that the use of the whole surface of the court for passage had been general and unopposed, and that such surface had been repaired at the expense of the lot owners, that no definite assignment of the location and width of the way in the court had been established by user, and that the plaintiffs were entitled to a convenient way, which he located along the northerly and easterly sides of the court, making its width the same as that of the covered passageway under the defendant's building through which access to the street was obtained. He found that if the way was so arched or built over as to correspond in height with the existing covered passageway there would be no unlawful interference with the plaintiffs' rights of way. *Held*, that as the words "in and over the passageway and open court on the northerly and easterly sides" were unambiguous, and as no rights had been acquired by prescription, the rights of the plaintiffs could not be extended by their unopposed use of the whole surface of the court, and that the way and the court were not commensurate in width. *Held*, *also*, that the plaintiffs could not be deprived of the access of light and air so far as these were indispensable for the proper use of a passageway of the dimensions which had been established by the master, and that the defendant must leave such openings for light and ventilation as might be found to be necessary for the convenient use of the way. *Lipsky* v. *Heller*, 310.

To enforce Restriction on Land.

Bill in equity to restrain use of building as garage on property subject to restriction against any use or business "offensive to the neighborhood for dwelling houses," see *ante*, 1.

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To enforce Condition in Grant of Location to Street Railway Company.

Bill in equity to enforce condition under which grant of location was made under Pub. Sts. c. 113, § 7, in 1877 by selectmen of Clinton to Worcester and Clinton Street Railway Company, requiring carrying of certain pupils in certain schools and colleges at half fare, see STREET RAILWAY, 4.

To restrain Unfair Competition.

Bill in equity to restrain competition alleged to be unfair because defendant imitated size and shape of loaf of bread which plaintiff made for trade, see UNFAIR COMPETITION.

To restrain Unlawful Interference with Contract.

See UNLAWFUL INTERFERENCE.

To obtain Insurance made for Plaintiff's Benefit.

Suit in equity cannot be maintained by owner of certain goods against railroad company, in whose possession goods were when destroyed by lightning, and against insurance company which had insured railroad company in policy "attaching upon property, interest and legal liability" of railroad company and including property of all kinds "for which insured may be legally liable," to have insurance of interest of railroad corporation applied for his benefit, see INSURANCE, 2.

EQUITY PLEADING AND PRACTICE.

Bill.

1. Upon a reservation by a single justice of this court for consideration by the full court of an exception to a ruling of a master, to whom a suit in equity had been referred, in which he refused to allow a certain claim of the plaintiff on the ground that the allegations of the bill were not broad enough to include the claim, such exception must be sustained if it appears that the defect in the allegation in the bill was one which might have been taken advantage of by demurrer or one that might have been cured by a merely formal amendment, and if, on the facts as found by the master, the plaintiff was entitled to relief. *Atherton* v. *Emerson*, 199.

Amendment.

2. A bill in equity, by a married man against a single woman, sought to establish the plaintiff's title to household furniture used in an apartment in which the plaintiff and the defendant had been living together, and a stipulation was made by the counsel for both parties that the title to the property should be tried in the suit. A master to whom the case was referred found for the defendant upon the issue of the title to the furniture. After this finding against him the plaintiff moved for leave to amend his

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bill by alleging a debt from the defendant to the plaintiff, and seeking under R. L. c. 159, § 8, cl. 7, to reach the furniture as the property of the defendant. The judge who heard the case denied the motion. *Held*, that, even apart from the fact that the property, so far as it was not exempt from attachment, apparently could have been reached at law, the motion to amend was denied rightly. *Otis* v. *Freeman*, 160.

8. In a suit in equity, while appeals by both the plaintiff and the defendant from a decree made by a single justice of this court, ordering the defendant to pay to the plaintiff a certain sum of money, were pending before the full court, the defendant applied to this court for leave to file a supplemental answer setting up a judgment of another court, rendered after the appeals were taken, as a bar to the plaintiff's claim. It was *ordered*, that the decree be vacated, and that the case be remitted for hearing before a single justice upon the question whether the defendant should be allowed to file the supplemental answer, and, in case such filing should be allowed, for further hearing after the filing of the supplemental answer upon the matters set up in that answer, and for reversal or such modification of the original decree, if any, as ought to be made by reason of these matters, or for reservation for determination by the full court of the questions arising upon the supplemental answer. *Old Dominion Copper Mining & Smelting Co.* v. *Bigelow*, 488.

Where merely formal amendment would cure defect in allegations in bill which master has found in report precluded plaintiff from maintaining claim, all facts necessary to sustain suit having been found in plaintiff's favor, exception to ruling of master must be sustained, see *ante*, 1.

Master's Report.

4. In a suit in equity which has been referred to a master, where the plaintiff to establish his right to relief must show that he furnished certain proof within sixty days after notice in writing had been given by the defendant to a certain corporation, if the defendant at the hearing before the master shows that, more than sixty days before any proof was offered by the plaintiff, such notice was contained in a letter sent by him to the corporation, which ought to have been received by the corporation, warranting the inference that the letter was received, if the master does not state expressly that he has drawn that inference, but makes a special finding that no proof was furnished by the plaintiff until a period of more than sixty days had elapsed after the receipt of the notice, this finding includes the drawing of the inference. *Allen* v. *Wilbur*, 366.

Exceptions to master's report, see *post*, 5–10.

Exceptions to Master's Report.

5. A party to a suit in equity who fails to file exceptions to a master's report in support of objections which he has filed is deemed to have accepted the report. *Lipsky* v. *Heller*, 310.

6. Where a master's report does not report the evidence a party to the suit

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who has filed exceptions to the report is none the less concluded by the master's findings of fact. *Lipsky* v. *Heller*, 310.

7. Where the plaintiff in a suit in equity informs the master to whom the case has been referred that he does not desire a finding on one of the matters included in his bill and the master accordingly leaves this question undecided, no objection on this ground is open to the plaintiff on exceptions to the master's report or on an appeal from a decree confirming it. *Ibid.*

8. Exceptions to the rulings of a master, to whom a suit in equity has been referred, upon the admissibility of evidence not plainly affecting his conclusions upon the real merits of the suit, are not readily to be sustained. *Atherton* v. *Emerson*, 199.

9. Upon a reservation by a single justice of this court for consideration by the full court of exceptions to findings of fact contained in the report of a master to whom a suit in equity was referred, the report containing all the evidence introduced before the master, such findings will not be revised unless they are plainly wrong, although upon some of the issues the full court might not have come to the same conclusions as were reached by the master. *Ibid.*

10. Exceptions to material findings of fact by a master will not be sustained where the evidence upon which the findings were made is not reported and it does not appear that the findings are inconsistent with the rest of the report. *O'Brien* v. *McNeil*, 164.

Exception to report of master refusing to allow claim of plaintiff because not sufficiently stated in bill will be sustained if master finds facts sufficient for sustaining claim and defect in bill might have been taken advantage of by demurrer or cured by merely formal amendments, see *ante*, 1.

Memorandum of Judge.

Memorandum of his decision made by judge who heard suit in equity and made decree which was appealed from, although made by him voluntarily, is part of record as report of facts under R. L. c. 159, § 23, see *post*, 13.

Decree.

Decree for plaintiff vacated after appeal from it to this court to allow amendment by defendant setting up judgment of court of another jurisdiction, rendered after such appeal and alleged by defendant to be bar to plaintiff's claim, see *ante*, 3.

Dismissal without Prejudice.

11. It is within the discretion of a justice of this court presiding at the hearing on the merits of a bill in equity, filed under R. L. c. 163, § 17, seeking a reversal of a decree of the Court of Insolvency, to refuse to allow a motion of the plaintiff that the bill be dismissed without preju-

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dice, where such motion is made after such hearing has begun; and to the exercise of such discretion no exception lies. *Jackson* v. *Ensign*, 116.

Appeal.

12. On affirming a decree of the Superior Court on appeal, it was ordered that the decree should be modified to include the costs of the appeal to this court and as modified should be affirmed. *Howe* v. *Howe*, 598.

13. On an appeal to this court from a decree in equity a memorandum of decision of the judge who made the decree, although filed by the judge voluntarily without the request of either party, stands on the same footing as a report of findings of fact made under R. L. c. 159, § 23, and the decision reported in such a memorandum will not be set aside unless plainly wrong. *Ibid.*

Case where, on appeal from decree of single justice granting prayers of bill after hearing, all evidence being reported, decree was reversed, see MORTGAGE.

Appeal from decree of judge who heard suit in equity will not be sustained where decree is within scope of bill and there is no report of findings of fact or rulings of law, see EQUITY JURISDICTION, 5.

Where at hearing of suit before master party states that he does not desire finding on certain subject included in bill, he cannot on appeal object to failure of master to deal with such subject in his report, see *ante*, 7.

While appeal from decree for plaintiff was pending in this court, decree was ordered vacated to allow amendment by defendant setting up judgment of court of another jurisdiction rendered after such appeal, and alleged by defendant to be bar to plaintiff's claim, see *ante*, 8.

Costs.

Decree modified on appeal to include costs of appeal, see *ante*, 12.

ESTOPPEL.

One who once held title to real estate subject to resulting trust which he conveyed at request of beneficiary to another, is not estopped afterwards to enforce the trust as devisee of beneficiary, see TRUST, 9.

Fact that one, who at suggestion of tax collector received conveyance of land sold at tax sale to another, did so by agreement with person to whom land was sold, does not estop him from maintaining action under R. L. c. 13, § 44, to recover money paid for invalid tax title, see TAX, 8.

Street railway corporation which has consented to come into being under Pub. Sts. c. 113, §§ 2–8, after having accepted location from town subject to restrictions at that time lawful and imposed under § 7, is estopped to complain of such restrictions, see STREET RAILWAY, 2.

Entry of appearance, unauthorized by instructions, as opposing petition for proving of will, by lawyer as counsel for one who had made compromise arrangement and had agreed not to oppose proving of will held not to

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estop client from insisting upon compromise arrangement being carried out, see CONTRACT, 29.

Action of owner of private way and lots of land bounding thereon in not opposing petition for registration of title of another lot bounding on same way and in not assisting in giving true lines of way, whereby title as registered gave incorrect lines of way as to that lot, held not to prevent him from insisting upon true position of way in registration of title of another lot bounding thereon, see LAND REGISTRATION.

EVIDENCE.

Judicial Notice.

1. This court takes judicial notice of the facts that a corporation, which was organized since 1864, and which owns and operates a street railway in this Commonwealth, must have been organized under the laws of this Commonwealth, and that its organization was not under a special charter. *Selectmen of Clinton* v. *Worcester Consolidated Street Railway*, 279.

Presumptions and Burden of Proof.

2. In a suit in equity which has been referred to a master, where it is material to show that a certain notice was given to a corporation, if the party wishing to prove the notice shows that a letter containing the notice properly addressed to the treasurer of the corporation, who had full charge of its business, was delivered by a messenger at the office of the treasurer which also was the office of the corporation, and that in the ordinary course of business he should have received it, and the treasurer of the corporation testifies that he never received the letter and did not know of its existence until a copy was shown to him while he was testifying, this warrants a finding by the master that the notice was given and received, as the master is at liberty to disbelieve the testimony of the treasurer, and the fact that the letter ought to have been received warrants the inference that it was received. *Allen* v. *Wilbur*, 366.

In absence of evidence, it cannot be presumed that common or commercial law of England differs from that of this Commonwealth, see *post*, 18.

Evidence held to overcome any presumption there might be that real estate conveyed to son by father was by way of gift and to warrant finding that resulting trust was created, see TRUST, 7.

Action on policy of accident insurance, evidence introduced at trial of which made question whether alleged accident was sole cause of death of insured one eminently for jury, see INSURANCE, 4; while other evidence warranted jury in finding that there had been no payment of indemnity called for by policy, see *ibid.* 5.

Evidence, which was introduced before master who was hearing suit in equity by trustee in bankruptcy of corporation to recover property conveyed by corporation as fraudulent preference, held, though called by master in his report "light," sufficient to warrant findings of fact necessary to maintenance of suit, see EQUITY JURISDICTION, 13.

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Admissions and Confessions.

3. It is no ground for excluding evidence of a confession of a defendant in a criminal case that it is related by the witness "in a narrative form." *Commonwealth* v. *Johnson*, 55.

4. If the president of a corporation, who is its chief executive officer, makes a statement in a letter, written by him in his official capacity in conducting the business of the corporation, upon a matter which naturally would be within his personal knowledge, his statement is admissible in evidence in an action against the corporation in which the statement is relevant as an admission of the defendant. *Garfield & Proctor Coal Co.* v. *Pennsylvania Coal & Coke Co.* 22.

Evidence tending to show admission by attorney at law, retained generally by customer of certain firm, that he had notice of dissolution of partnership is not competent to show notice to customer where it appears that at time of notice attorney was not acting on behalf of customer in any matter, see ATTORNEY AT LAW, 1, 2.

Acceptance by street railway corporation of location subject to restrictions imposed by selectmen of Clinton under Pub. Sts. c. 113, § 7, and subsequent creation of corporation taken to be admission by corporation that restrictions were reasonable and for public interest, see STREET RAILWAY, 3.

Failure to produce material evidence in control of party to explain or controvert evidence adverse to him is ground for inference that adverse evidence is admitted to be true, see TRUST, 6; POSSESSION OF BURGLARIOUS IMPLEMENTS, 4; PRACTICE, CRIMINAL, 2.

Opinion: Experts.

5. In an action of tort for the alleged conversion of household furniture belonging to the plaintiff, a woman, and used by her in her home, her opinion as to the value of the furniture is competent on the question of damages. *Berry* v. *Ingalls*, 77.

6. At the trial before a jury of an action of tort to recover for the alleged conversion of shop furniture of such a nature that its value is not to be presumed to be within the knowledge of all the jurors, a witness who is acquainted with similar property and its value and has the requisite knowledge and experience may be examined by hypothetical questions, although he has not seen the particular furniture to which the trial relates. *Ross* v. *Shrieves*, 401.

7. In an action by a carpenter employed by a contractor to assist in tearing down an old roof, for personal injuries from a fall caused by the plaintiff stepping on one of the rafters of the old roof which proved to be rotten, an expert witness, who has described the building and the roof, cannot be asked whether he "would have reason to expect that there may have been leaks in that roof or some part of it," it being a matter of common knowledge that old roofs are likely to leak and that the natural result of water leaking through a roof is to produce decay. *Boisvert* v. *Ward*, 594.

8. In an action by a carpenter employed by a contractor to assist in tearing

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down an old roof, for personal injuries from a fall caused by the plaintiff stepping on one of the rafters of the old roof which proved to be rotten, an expert witness, after the attendant conditions of the accident have been shown, cannot be asked whether in his opinion the plaintiff "was proceeding in the usual and ordinary way to do" his work, this, in the case of work so simple in its character, being a question for the jury, who are to pass upon the issue whether the plaintiff was using ordinary care, and in doing so are to determine what common prudence required under the circumstances. *Boisvert* v. *Ward*, 594.

9. On objection by the defendant at a trial to a hypothetical question put by the plaintiff to an expert witness, on the ground that the question assumed facts which were not in the evidence, the presiding judge allowed the question to be put, stating to the jury both at the time it was put and afterward in his charge that, if they did not find the facts to be as they were assumed to be in the question, they should disregard the answer. *Held*, that the defendant had no ground for exception. *Hunneman* v. *Phelps*, 15.

Testimony of expert as to damages at trial before auditor of action for breach of contract need not necessarily be accepted by auditor although there is no other evidence offered on the subject, see DAMAGES, 9.

Chief inspector of police of city allowed to testify, at trial of six defendants on charge of having in their possession burglarious implements intending to use them as such, that certain implements found at house where defendants lived were such as ordinarily were used by burglars, see POSSESSION OF BURGLARIOUS IMPLEMENTS, 2.

Best and Secondary.

10. In an action upon a contract guaranteeing sales made by the plaintiff to a certain corporation, of which at the time the guaranty was executed the defendant owned substantially all the stock, the defendant testified that before the sales to the plaintiff were made he had withdrawn from the corporation, had transferred all his shares to a person who was the treasurer of the corporation, and in an interview with the plaintiff had informed him of his withdrawal and had notified the plaintiff that he no longer would guarantee the debts of the corporation, to which the plaintiff had assented, saying that a formal notice revoking the defendant's guaranty would be unnecessary. All of this was denied by the plaintiff, who testified that he never had received any notice of a revocation of the guaranty or of the defendant's disposing of his interest in the corporation. The plaintiff called as a witness the person to whom the defendant testified that he transferred his shares in the corporation, and who was its treasurer. This witness testified that all the books of the corporation had been lost or destroyed and could not be produced. He also testified that he could not remember how many shares of stock the defendant had, nor how many he himself had, nor what other persons held stock, nor whether or not the defendant had transferred his shares. The corporation was organized in another State. The plaintiff offered in evidence a

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certificate of the secretary of state of that State certifying to a copy of a record of a return, purporting to be made by the witness as treasurer of the corporation. The return purporting to be signed by the witness was dated one year after the time when the defendant had testified that he had transferred all his shares to the witness, and contained a list of the stockholders, in which the defendant was put down as the holder of a large number of shares. The witness was shown the certificate and was asked whether he made the return of which the certificate purported to be a copy. He answered that he did not remember, but that he was required to make such a return once a year, and that if he made that return he thought it was correct. Subject to the exception of the defendant the judge admitted the certificate in evidence for the purpose of showing that the witness "made such a report, and for no other purpose." *Held*, that the plaintiff was entitled to show that one year after the time when the defendant testified that he had transferred his shares they still stood in his own name, that, in view of the loss of the books of the corporation and the inability to produce them and of the want of recollection of the treasurer as to who were the stockholders or whether the defendant had transferred his shares, a copy of the record of a return purporting to be signed by a person bearing his name and occupying the office which it was shown that he occupied was admissible as some evidence to show that the witness was the same person who filed the return, and that this evidence, taken in connection with the testimony of the witness that if he made the return it was correct, had a tendency to show the truth of the statements contained in it; *also*, that this evidence did not contradict the testimony of the witness called by the plaintiff, as it was not inconsistent with his statement that he did not remember; *also*, that the matter on which the statements in the return tended to contradict the defendant was not an immaterial one, as the truth of the defendant's statements as to his ownership of the stock had a material bearing upon the probability of the ground of defense set up by him. *Cumberland Glass Manuf. Co.* v. *Atteaux*, 426.

Certified copy of existing document admitted for special purpose, see *post*, 16.

Criminal case in which testimony as to contents of lost telegram by one who read it to defendant and by another who heard it read was admitted, see Possession of Burglarious Implements, 6.

Remoteness.

11. It is within the discretion of the judge presiding at a trial, where the value of peaches at the termination of a two weeks' journey on an express car is in question, to exclude evidence as to the price paid to the grower for the peaches at wholesale when they were delivered from the orchards to the carrier. *Henry J. Perkins Co.* v. *American Express Co.* 561.

12. A petition was filed on March 16, 1904, in the bankruptcy court against a corporation seeking to have it adjudged a bankrupt, and, because the petition was contested and the adjudication and the appointment of a

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trustee were thereby delayed, the court appointed a receiver to take charge of the assets in the meantime. The receiver, after reasonable efforts to get the highest price obtainable for the assets, sold them to one who had been the president, treasurer, general manager and a member of the board of directors of the corporation. At the hearing before a master of a bill in equity by a trustee in bankruptcy of the corporation, who was afterwards appointed, against him who had been president, treasurer, general manager and a member of the board of directors of the corporation, to recover the value of certain property conveyed to the defendant by way of preferences by the corporation before the filing of the petition, testimony as to the amount for which the assets were sold by the receiver to the defendant was admitted as evidence on the question of what the value of the assets was, and the defendant excepted. *Held*, that the evidence was not too remote, and was admissible. *Atherton* v. *Emerson*, 199.

18. At the hearing before a master of a bill in equity by the trustee in bankruptcy of a corporation against one who was president, treasurer, general manager and a member of the board of directors of the corporation, to recover the value of property alleged to have been conveyed by the corporation to the defendant by way of preference, it appeared that an involuntary petition against the corporation, seeking to have it adjudged bankrupt, was filed on March 16, 1904, and that appraisers appointed by the bankruptcy court appraised the assets of the corporation on April 11, 1904. A material question was whether the corporation was insolvent on December 10, 1903, and the plaintiff offered as evidence to prove such insolvency the testimony of the appraisers as to what was the value of the property which they had seen and examined. The master admitted the evidence, and stated in his report that it was of slight probative value but was enough "to turn the scale," and the defendant excepted. *Held*, that the evidence might have been found by the master not to be too remote under the circumstances, and that the exception therefore must be overruled. *Ibid.*

Extrinsic affecting Writings.

14. The rule that an agreement in writing cannot be varied or contradicted by oral testimony is not a mere rule of evidence but is one of substantive law, and rests on the principle that where the parties deliberately have put their agreement in writing they shall not be allowed to say that the agreement was something else. For this reason testimony at a trial showing an oral agreement which tends to vary the terms of a contemporaneous contract in writing between the same parties can have no effect to change the terms of the contract although it has been admitted without objection and has become a part of the evidence in the case. *Mears* v. *Smith*, 319.

15. In an action for the alleged breach of a contract in writing for the sale and shipment of a certain amount of coal in each month during a period named, the correspondence and negotiations of the parties before the

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making of the contract may be competent, under the circumstances of the particular case, as an aid in construing the language in which the parties finally embodied their agreement, by enabling the court to understand the subject matter of the contract as it lay in the minds of the parties and thus to determine the meaning which they put upon any doubtful or ambiguous terms they may have used; but merely tentative offers made by either party while they were endeavoring to reach an agreement cannot control the plain meaning of their contract as finally concluded. *Garfield & Proctor Coal Co.* v. *Pennsylvania Coal & Coke Co.* 22.

Copy of Document admitted for Special Purpose.

16. Two of three appraisers, who had been appointed by the bankruptcy court to appraise the estate of a bankrupt and had filed their report, were called by the plaintiff to testify at a hearing before a master of a bill in equity where such value was a material fact, as to the value of the property at the time of the appraisal. One of them, being handed a certified copy of the report of the appraisers, which the master expressly said was to be used only to refresh the recollection of the witnesses, stated that the amounts in the copy were correct, and then stated what the amounts were. The other witness stated that he could not remember what the value was, but that it was as stated on the certified copy of the appraisers' report. The certified copy then was offered in evidence and admitted "as being an attested copy of the appraisal of these men appointed by the court." The third appraiser was not called. The defendant excepted to the admission of the certified copy of the report of the appraisers in evidence. A single justice of this court, before whom the exception was heard, reserved the case for consideration by the full court. *Held*, that, while neither the original nor a certified copy of the appraisal was admissible as in itself evidence of the value of the property appraised, it did not in this instance appear to have been offered or admitted as such evidence, but merely as a statement of the evidence intended to be given by the second witness; and that therefore there was no error in its admission. *Atherton* v. *Emerson*, 199.

Certified copy of return of treasurer of foreign corporation to officer of State of its incorporation as required by law of that State admitted in evidence only for purpose of showing that "such a report" was made, see *ante*, 10.

Admitted without Objection.

17. Where at a trial relevant evidence has been admitted without objection it has become a part of the case even if it might have been excluded upon objection. *Garfield & Proctor Coal Co.* v. *Pennsylvania Coal & Coke Co.* 22.

Evidence admitted without objection which, though given its full probative force, was held not to help party introducing it, see ATTORNEY AT LAW, 2; CONTRACT, 12; *ante*, 14.

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Auditor's Report as Evidence.

Auditor's report, which has not been recommitted and has had no part stricken out, and as to which a motion "to discharge" has been denied, must be admitted in evidence, see PRACTICE, CIVIL, 5.

De Bene.

Rights of defendant objecting to evidence admitted *de bene* at trial of criminal case, see PRACTICE, CRIMINAL, 5; POSSESSION OF BURGLARIOUS IMPLEMENTS, 7.

Circumstantial.

Intent of debtor to make fraudulent preference under bankruptcy act and reasonable cause on part of creditor to believe that such preference was intended may be shown by circumstantial evidence, see BANKRUPTCY, 1.

Photographs.

Photograph of experiment excluded properly by judge in exercise of discretion, see *post*, 20.

Photograph admitted as evidence to prove identity of defendant under indictment with five others charging them with having in their possession burglarious implements intending to use them as such, see POSSESSION OF BURGLARIOUS IMPLEMENTS, 5.

Of Identity.

Photograph admitted as evidence to prove identity of defendant under indictment with five others charging them with having in their possession burglarious implements intending to use them as such, see POSSESSION OF BURGLARIOUS IMPLEMENTS, 5.

Evidence that defendant, at house where burglarious implements were found, received telegram addressed to him there, was admitted at trial of defendant on indictment for having such implements in his possession with intent to use them as such, see POSSESSION OF BURGLARIOUS IMPLEMENTS, 6.

Of Notice.

Question whether certain evidence warranted inference that notice was given to corporation by letter received by treasurer, see *ante*, 2.

Evidence of notice on part of person receiving conveyance of real estate of resulting trust to which it was subject, see TRUST, 6.

Foreign Law.

18. In the absence of evidence, it cannot be presumed that the common or the commercial law of England differs from that of this Commonwealth. *Gordon* v. *Knott*, 178.

19. Upon the question of fact what the law of England is upon a particular subject, this court can no more consider statements made in one of their previous opinions than it can consider decisions of the English courts not put in evidence at the hearing. *Ibid.*

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Of Experiments.

20. In an action against one in control of a house for personal injuries alleged to have been incurred while travelling on a public sidewalk by reason of a nuisance maintained by the defendant, where there was evidence warranting a finding that the defendant collected the surface water from his roof by spouts which poured it upon an inclined concrete walk on the land of the defendant, down which it flowed to the sidewalk of a public way in such a manner as to create a nuisance by freezing in a ridge, the defendant offered evidence to show that since the accident there had been no changes in the grade, the ground or the laying out of the defendant's premises, the walk or the eaves spouts, and then offered a photograph taken while the trial was in progress during a rain storm of much greater severity than any occurring near the time of the accident, for the purpose of showing the directions taken by water thrown from the spouts and after it reached the defendant's walk, and that such water did not and could not flow to the public sidewalk. The judge excluded the photograph. The defendant excepted to its exclusion. The ground of the judge's ruling was not stated. A photograph of the place when there was no storm was admitted in evidence. *Held*, that the photograph excluded was at the best a photograph of an experiment, and that it was the duty of the judge to determine, as a matter of discretion, the preliminary question whether the conditions were sufficiently similar to make the observation recorded in the photograph of any value in aiding the jury to pass upon the issue to be submitted to them, that the exercise of this discretion could not be interfered with unless plainly wrong, and that there was nothing in the present case to show that the exclusion of the photograph was error. *Field* v. *Gowdy*, 568.

Testimony in nature of narration of experiment held admissible in discretion of judge presiding at trial of six defendants on indictment charging them with having in their possession burglarious implements intending to use them as such, see POSSESSION OF BURGLARIOUS IMPLEMENTS, 8.

Of Violation of By-law of Municipality.

By-law of town is admissible in evidence in action against owner of real estate whose violation of it caused plaintiff to be injured, see NUISANCE, 2.

Of Violation of Rule of Street Railway Company by Employee.

Evidence of violation of rule of street railway company by motorman which was held to be evidence of negligence which caused injury to guest in automobile run into by street car, see NEGLIGENCE, 18.

Relevancy and Materiality.

21. An action of contract was referred to an auditor. The defendant appeared for herself at the hearings before the auditor. At the trial be-

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fore a jury after the filing of the auditor's report, it appeared that during the hearings before the auditor the plaintiff had moved that a guardian *ad litem* of the defendant be appointed. The plaintiff, in order to rebut a contention of the defendant, which the defendant's counsel stated that he would make in his argument to the jury, that the plaintiff in asking for the guardian had acted in bad faith, offered evidence tending to show that, before the plaintiff asked for the guardian, the auditor of his own accord had interviewed the judge and had laid before him the facts upon which the plaintiff had relied in making his motion, and that the judge had suggested that a motion be made for a guardian, and that "any one in the case could make that." The evidence was admitted and the defendant excepted. *Held*, that the evidence was admitted rightly, since it was relevant and material to rebut the contention of the defendant. *Hunneman* v. *Phelps*, 15.

22. At the trial of an action against a street railway company to recover for personal injuries alleged to have been received by the plaintiff from his being thrown from a street car of the defendant as he was about to alight, at a place which was not a regular stopping place, the presiding judge excluded the following question asked of a witness other than the plaintiff: "At the time when the plaintiff stepped from the platform down on to the step and was on the step, what do you say with regard to where you expected the car was going to make the stop?" *Held*, that the exclusion was proper, since it was irrelevant what inference the witness might draw from the facts before his mind. *Stevens* v. *Boston Elevated Railway*, 471.

23. An auditor, to whom was referred an action of contract for the value of professional services rendered by the plaintiff, an attorney at law, to his client, the defendant, stated in his report "I find that it must have been evident some time before the termination of the relation of attorney and client . . . that from [the defendant's] . . . inability to speak the truth on any topic, even to her own counsel, it was difficult to be of material assistance to her." At the trial of the case before a jury, the plaintiff having introduced the report in evidence, the defendant called as a witness an attorney at law who had acted as her counsel for a year after the services of the plaintiff were rendered, who testified as to the defendant's general reputation for truth and veracity, but the presiding judge refused to allow him to be asked whether, during his relationship with the defendant as a client, he had found her to be a truthful woman. The defendant's counsel stated that the question was asked to rebut the quoted portion of the auditor's report. *Held*, that the question rightly was excluded, since the counsel referred to by the auditor was the plaintiff, and not any previous or subsequent counsel. *Hunneman* v. *Phelps*, 15.

Evidence held to be relevant because contradicting defendant on material issue as to whether or not at certain time he was stockholder in certain corporation, see *ante*, 10.

Evidence held relevant at trial of six defendants on indictment under R. L. c. 208, § 41, for having in their possession burglarious implements intending to use them as such, see POSSESSION OF BURGLARIOUS IMPLEMENTS. 1–8.

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Failure to produce.

Failure to produce material evidence in control of party to explain or controvert other evidence adverse to him is ground for inference that adverse evidence is true, see TRUST, 6.

Inferences may be drawn from failure of defendant in criminal case to produce witnesses to testify on material matters of defense, see PRACTICE, CRIMINAL, 2; POSSESSION OF BURGLARIOUS IMPLEMENTS, 4.

Exhibit objectionable because of Prejudicial Writing upon it.

Where photograph was admitted properly to prove identity of defendant in criminal trial, fact that it had writing on back which was prejudicial to defendant will not cause exception to its admission to be sustained, if writing was not called to the attention of the presiding judge, see POSSESSION OF BURGLARIOUS IMPLEMENTS, 5.

EXPRESS COMPANY.

Action against express company for damages resulting from cars transporting peaches not being iced properly, in which were questions as to whether special contract as to icing was made by consignee or consignor, and as to effect of contract made, see CARRIER, 5, 6.

FIRE.

Insurance against loss or damage by fire, see INSURANCE, 2, 3.

Action to enforce liability of railroad for injury caused by fire communicated from locomotive, see RAILROAD.

FIXTURES.

1. As between the mortgagor and the mortgagee of a dwelling house, gas fixtures attached to the building and used with it may or may not be personal property according to the facts and circumstances which tend to show that they do or do not belong to the building and were or were not intended to remain with the building as a part of it. And this also is true of steam radiators, a kitchen range and window screens and door screens. *Hook* v. *Bolton*, 244.
2. A gas stove and window shades, running on rollers, in an ordinary dwelling house for a single family, not peculiarly fitted for use in this house but of a standard pattern, loosely affixed and easily removed, put into the house by its owner and mortgagor, as matter of law are personal property, and do not pass as part of the realty on a foreclosure sale under the mortgage. *Ibid.*

FORGERY.

Uttering forged instrument, see that title.

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Case in which, in action on promissory note, defense, that note was vitiated because payee agreed if it was given to him to compound felony of forgery, was held not to have been made out, see BILLS AND NOTES.

FRAUD.

Suit by trustee in bankruptcy of corporation to recover property conveyed by bankrupt as fraudulent preference, and excessive salary paid by corporation to defendant as one of its officers, see EQUITY JURISDICTION, 13–17.

Suit in equity to have amount due under insurance policy paid to plaintiff instead of to defendant on ground that plaintiff formerly had been beneficiary but defendant through fraud had induced insured before his death to change name of beneficiary in policy, see EQUITY JURISDICTION, 5.

FRAUDS, STATUTE OF.

Statute of frauds does not prevent establishment of resulting trust through proof by oral evidence that purchase money for real estate was paid by other than person to whom real estate was conveyed, nor affect continuance of that trust, though no memorandum made when the property was conveyed at request of beneficiary to others, see TRUST, 5.

FRAUDULENT PREFERENCE.

See EQUITY JURISDICTION, 13–16.

GAMING.

See WAGERING CONTRACTS, 1, 2.

GARAGE.

Bill in equity to restrain use of building as garage on property subject to restriction against any use or business "offensive to the neighborhood for dwelling houses," see EQUITY JURISDICTION, 1.

GAS AND ELECTRIC LIGHT COMMISSIONERS.

Under R. L. c. 109, § 26, providing that if, when the board of gas and electric light commissioners approves of an issue of new stock or bonds by a gas or electric light company, it determines that the fair structural value of the plant is less than its outstanding stock or debt, it may require the impairment of capital to be made good, that board is not given the power to require such impairment to be made good except as it makes such requirement a condition under which the new stock or bonds may be issued. *Childs* v. *Krey*, 352.

Where gas and electric light commissioners have made order permitting

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electric light company to issue additional stock on condition that certain impairments of capital be made good, and company abandoned project of issuing new stock, order as to making good impairment is inoperative, see CONTRACT, 80.

GAS COMPANY.

1. Under R. L. c. 58, §§ 16, 17, providing that a gas company may stop gas from entering the premises of a person who neglects or refuses to pay the amount due for gas previously supplied to him, but that such company shall not refuse to supply gas to a person because a bill for gas remains unpaid by the previous occupant of the building or premises, a gas company cannot refuse to supply gas to the assignee of a corporation under a voluntary assignment for the benefit of creditors because a gas bill of the corporation remains unpaid. *Cox* v. *Malden & Melrose Gas Light Co.* 324.

2. In the absence of any contract or previous dealings between the parties, a suit in equity cannot be maintained by the occupant of a building against a gas company to enjoin the defendant from wrongfully shutting off gas from the premises of the plaintiff because of an unpaid gas bill of a previous occupant of the premises in violation of the provision of R. L. c. 58, § 17, as the plaintiff has a plain remedy at law by a petition for a writ of mandamus. *Ibid.*

GIFT.

If the owner of negotiable coupon bonds about four months before his death places them, together with all the coupons not then due, in the custody of his sister with the intention that they shall remain his property during his life and on his death shall become the property of his sister, and tells her that this is his intention and she accepts the custody of the bonds on those terms, and thereafter the coupons are collected by the owner until his death as his property, a part of them being cut off and brought to him by his sister at his request, there is no gift of the bonds, and on the death of the owner they pass to the administrator of his estate. *Howe* v. *Ripka*, 359.

Evidence held to overcome presumption that real estate conveyed to son was by way of gift, and to warrant finding that resulting trust was created, see TRUST, 7.

GOOD WILL.

A corporation engaged in the United States in the manufacture of rubber goods made a contract in writing with one whom it appointed its *del credere* agent in England by which goods were sent to the agent on consignment only, the title to them to remain in the company until they were sold to a customer, and full knowledge of all the details of the agent's operation, of his lists and of his customers was secured to the company. The agent acquired an extended knowledge of and large experience in the business of selling the company's goods, and a wide acquaintance with travelling salesmen in the business and with probable purchasers of such goods. Becoming dissatisfied with the working out

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of the contract, the parties agreed to terminate it, and the agent executed and delivered to the company an assignment in writing which was drawn up by the company's solicitor and which stated that the agent "as beneficial owner hereby assigns to" a nominee of the company "all the leasehold premises upon which the business is carried on . . . and all the goodwill of the said business and all the plant, materials, stock in trade, book debts, and assets whatsoever," the company agreeing to account to the agent for the value of what was covered by the assignment. The company refused to account for the value of the good will, and the agent brought a suit in equity to compel it to do so, after a hearing in which the presiding justice found "that the plaintiff was the owner of something which the parties called a good will," which the defendant had agreed to pay for; and he ordered the accounting prayed for. The defendant appealed. *Held*, that the justice well might have found that the knowledge, experience, acquaintance and ability of the plaintiff constituted what the parties called a good will, which the plaintiff could not use after the assignment, and which might be found to be of value, and for which, therefore, in accordance with the agreement, the defendant should account to the plaintiff. *Gordon* v. *Knott*, 178.

Suit in equity by one who, by compulsory dissolution of partnership of which he was member, had been forced to retire, against former partners seeking accounting for property of partnership including its good will, and various questions raised therein, see PARTNERSHIP, 1–4; EQUITY JURISDICTION, 6–8.

GRADE CROSSING.

Interference with light, air and prospect by railroad company in abolition of grade crossing is no ground for recovery of damages by landowner unless in course of abolition some land or easement in land was taken or private way was changed or discontinued, see DAMAGES, 1–4.

GREAT POND.

Although the Legislature have the power to take the waters of a great pond for a public purpose without making any compensation to owners on streams flowing from it, yet, in granting a right to use the waters of the pond for a public purpose, such as the water supply of a town, they may, if they please, require compensation to be made to private persons where no legal right has been interfered with. *Dodge* v. *Rockport*, 274.

Brook, which is outlet of great pond and through which waters of pond have flowed to sea for more than two hundred years, has acquired character of natural watercourse, although originally artificial, see WATERCOURSE, 1.

GUARDIAN.

Time within which, after "discharge" of guardian of insane person, action against sureties on his bond must be brought, see LIMITATIONS, STATUTE OF, 2, 3.

Death constitutes such discharge, see LIMITATIONS, STATUTE OF, 1.

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HEALTH, BOARD OF.

See BOARD OF HEALTH.

HIGHWAY.

See WAY.

ICE AND SNOW.

Cases involving liability of owner of real estate to tenant and to travellers on highway for injury resulting to plaintiff from falling upon ice alleged to have been caused by owner to be collected upon leased premises or upon highway, see LANDLORD AND TENANT, 8; NUISANCE, 1–4.

INSANE PERSON.

Action against sureties on bond of guardian of insane person, see LIMITATIONS, STATUTE OF, 1–3.

Continued insanity of ward does not prevent running of special statute of limitations, R. L. c. 149, § 5, limiting time within which action against sureties on bond of guardian of such insane ward can be brought to four years from time of discharge of guardian, see LIMITATIONS, STATUTE OF, 2, 3.

INSOLVENCY.

Denial of motion for dismissal without prejudice of bill filed under R. L. c. 163, § 17, seeking reversal of decree of Court of Insolvency, held proper exercise of discretion of this court and not subject to exception, see EQUITY PLEADING AND PRACTICE, 11.

INSTRUMENT.

See DEED; WILL.

INSURANCE.

Construction of Policy.

1. In construing a policy of insurance, such construction should be adopted, if fairly warranted, as will best carry out the object for which the contract was entered into, namely, that of securing indemnity to the insured for the losses to which the insurance relates. *Cutting* v. *Atlas Mutual Ins. Co.* 380.

Life.

Statutory requirements as to substance and form of policies of life insurance, duties and powers of insurance commissioner and rights of insurance companies with regard thereto, see *post*, 6–17.

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Bill in equity by daughter of one who had died leaving life insurance payable to his wife, seeking to have insurance payable to plaintiff instead of to wife, on ground that it formerly had been so payable but that insured had been induced by fraud to change beneficiary in policy, see EQUITY JURISDICTION, 5.

Fire.

2. A policy of insurance against fire issued to a railroad corporation, which states that it is a policy "attaching upon the property, interest and legal liability" of the corporation and that it includes property held by the insured as a common carrier or warehouseman, or under any bill of lading, and property of all kinds "for which the insured may be legally liable," does not insure the interest of the owner in the goods which are held by the railroad corporation in its custody as warehouseman; and if goods so held are destroyed by a fire, which was caused by lightning and was due to no negligence of the railroad corporation, the owner of the goods cannot maintain a suit in equity against the insurance company and the railroad corporation to have the insurance of the interest of the railroad corporation applied for his benefit. *Washburn-Crosby Co.* v. *Home Ins. Co.* 463.

3. The A. insurance company insured a company, which owned and operated a system of tanks and pipes for the storage and transportation of petroleum and its contents in various localities in Pennsylvania, against loss by fire to an amount not exceeding $25,000 "on iron tanks and their contents consisting of petroleum and its products, all while contained in the State of Pennsylvania," and the policy contained the provision, "It is understood and agreed that this insurance shall not attach until all specific insurance is exhausted." A tank and its contents belonging to the insured and situated at Marcus Hook, Pennsylvania, was destroyed by fire, and, at the time of such loss, the insured, besides the policy above described, had other insurance on the property so lost and also on other property situated at Marcus Hook, and, after so much as was due under these policies upon the loss in question had been paid, the insured sought to recover the balance of the loss from the A. company. The other policies were still in force as to other property at Marcus Hook, and the A. company contended that the insurance which such other policies provided was "specific," and that it was not "exhausted." *Held*, without deciding whether the other insurance was or was not "specific," that the word "exhausted" used in the A. company policy meant exhausted as to any loss as to which recovery was sought, and therefore that, since no more could be recovered under the other policies as to the loss in question, the insured could recover under the policy of the A. company. *Cutting* v. *Atlas Mutual Ins. Co.* 880.

Accident.

4. In an action on a policy of accident insurance by the widow of the insured to recover the amount payable upon his death from injuries due to an accident of the kind covered by the policy, the terms of the policy re-

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quired the plaintiff to show that the death of the insured was due to the accident alone. The physician who attended the insured after the accident testified that in his opinion the accident was the sole cause of death. There was testimony of the plaintiff and others as to the appearance and condition of the insured before and after the accident which the jury could find tended to support the same conclusion. There was testimony as to whether the insured had been suffering from diabetes, and an attending physician testified that he was unable to tell whether the accident was the sole cause of death or not. There also was in evidence an application by the insured to the defendant for a weekly indemnity under the policy made at a time when he supposed that he had recovered from his injuries. *Held*, that the question whether the accident was the sole cause of the death of the insured was one eminently for the jury and that a finding by them that such was the case was warranted by the evidence. *Cheswell* v. *Fraternal Accident Association*, 267.

5. In an action on a policy of accident insurance by the widow of the insured to recover the amount payable upon his death from injuries due to an accident of the kind covered by the policy, it appeared that the insured had applied to the defendant for a weekly indemnity for his loss of time resulting from the accident which caused his death, and in his application had agreed that the indemnity when paid should be in full discharge of any and all claims under his policy against the defendant on account of the injuries in question and should release and forever discharge the defendant from all liability under the policy on account of those injuries. There was evidence that a letter containing a check for the amount claimed by the insured as weekly indemnity, properly addressed to the insured with a return imprint on the envelope in which it was enclosed and with postage prepaid, was mailed to the insured by the defendant's treasurer a few days before the death of the insured and that it never had been returned to the defendant. The defendant admitted that the check never had been used by the insured, and the plaintiff testified that she never had seen it, and that after the death of the insured she examined his clothes and pocket book and looked through his effects and found no check of the defendant. *Held*, that on this evidence the jury would be warranted in finding that the check never had been received by the insured and consequently that the weekly indemnity to which he made claim never had been paid to him. *Ibid.*

Forms of policies submitted to insurance commissioner under St. 1907, c. 576, § 75, by insurance companies which might transact business of life, endowment and accident insurance held objectionable because they violated provisions of § 34 in that they contained in one policy contracts for insurance of two of classes therein named, see *post*, 11, 12.

Endowment.

Statutory requirements as to substance and form of policies of endowment insurance, duties and powers of insurance commissioner and rights of insurance companies with regard thereto, see *post*, 6–17.

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Statutory Requirements as to Policy.

Constitutionality of statute.

6. St. 1907, c. 576, § 75, which provides that no policy of life or endowment insurance shall be issued or delivered in this Commonwealth until a copy of its form has been filed at least thirty days with the insurance commissioner, or if the commissioner notifies the insurance company in writing within such thirty days that in his opinion the form submitted does not comply with the requirements, specifying his reasons; and that the action of the commissioner shall be subject to review by "the Supreme Court of the Commonwealth"; and which prescribes certain substantive provisions that must be in all such policies, is a constitutional enactment regulating the business of insurance, being within both the police power of the Legislature and within its power as the creator of domestic and the controller of domestic and of foreign corporations doing business within the Commonwealth; nor does it improperly delegate power to the commissioner, since it merely appoints him as an administrative officer to pass upon whether the forms of policies submitted conform to the legislative requirements, his decisions being subject to review in original proceedings which the companies may bring before a court of law properly designated for the purpose. *New York Life Ins. Co.* v. *Hardison*, 190.

Rules of construction.

7. No departure from the exact requirements of St. 1907, c. 576, § 75, cl. 3, relating to the effect of statements in an application for life insurance, should be permitted in any policy unless it is too plain for doubt that the substitution is in every way as advantageous and as desirable to the insured as the prescribed provision. *Ibid.*

8. If the form of a policy of life or endowment insurance submitted by an insurance company to the insurance commissioner for his approval under St. 1907, c. 576, § 75, contains in substance the ten provisions specified in that section, and also contains the other prescribed parts of a policy, the form in which they are stated may be varied, and additional provisions beneficial to the insured may be inserted, provided the requirements of the statute are satisfied and are left undiminished by what is added. *Ætna Life Ins. Co.* v. *Hardison*, 181.

Duty of insurance commissioner.

9. Under St. 1907, c. 576, § 75, providing that no policy of life or endowment insurance shall be issued in this Commonwealth until a copy of its form has been filed at least thirty days with the insurance commissioner, or if the insurance commissioner notifies the company in writing within thirty days that in his opinion the form does not comply with the requirements of the laws of this Commonwealth, and that no such policy, except certain policies of industrial insurance, shall be issued unless it contains in substance certain provisions specified in the statute, it is the duty of the insurance commissioner to determine whether the policy contains the

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substantive provisions, called for by the statutes of this Commonwealth, in such a form as to give proper effect to the contract. *Ætna Life Ins. Co.* v. *Hardison*, 181.

Specific applications of statute.

10. A policy of life or endowment insurance which on its first page states "This contract is issued in consideration of the application for this insurance which is made a part hereof and copied hereon," and under the head "General Conditions," and the sub-head "Entire Contract," on a subsequent page states, "This instrument contains the entire contract between the parties hereto, and all the statements purporting to be made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall be used in defense of a claim under the contract unless it be contained in the application herefor," does not satisfy the requirements of St. 1907, c. 576, § 75, cl. 3, that the policy shall contain "a provision that the policy and the application therefor shall constitute the entire contract between the parties . . . and that no . . . statement [of the insured] shall be used in defense to a claim under the policy unless it is contained in a written application, and a copy of such application shall be endorsed upon or attached to the policy when issued"; but the words "and the application" should be added after the words "This instrument," at the beginning of the clause entitled "Entire Contract," and the words "and the application is attached hereto" should be added at the end. *Ibid.*

11. A life insurance company, which, under St. 1907, c. 576, § 34, cl. e, might also transact the business of insurance against bodily injury or death by accident, and upon the health of individuals, presented to the insurance commissioner, as required to do by § 75, a form of policy, which on its first page stated that the company agreed "to pay for the surrender of the policy [a certain sum to the beneficiary] . . . upon receipt of due proof of the death of the insured," and that the policy "is issued . . . subject to all the conditions, benefits and privileges described on the subsequent pages" thereof, which "are hereby made a part of this contract." On a subsequent page was a provision that, in case the company received proof that, "by reason of bodily injuries or disease originating after the issue of the policy, the insured has become wholly, continuously and permanently unable to perform any work" for profit, or under certain circumstances had lost both eyes or either or both hands or feet, the company would keep the policy in force for twelve months and then pay the insured one twentieth of the sum insured and make the same payment annually until the whole insured amount was paid, or would pay a specified annuity for life. The insurance commissioner disapproved of the policy. *Held*, that the commissioner's disapproval was warranted, since the form of policy presented violated the provisions of § 34 in that it contained in one policy contracts for insurance of two of the classes therein named. *Ibid.*

12. A life insurance company, which, under St. 1907, c. 576, § 34, cl. e, also might transact the business of insurance against bodily injury or death by

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accident, and upon the health of individuals, presented to the insurance commissioner, as required to do by § 75, a form of policy, which on its first page stated that the company agreed to pay a certain amount to the beneficiary on due proof of the death of the insured, and that "this contract is subject to the privileges and conditions recited on the subsequent pages hereof." On a subsequent page under the head "Special Privileges" was a provision that in case the insured should furnish satisfactory proof that he had become "wholly disabled by bodily injuries or disease and will be permanently, continuously and wholly prevented thereby for life from pursuing any and all gainful occupation, the company" would, "by an indorsement in writing upon this contract," agree to pay the premiums on the policy so long as the disability continued, without charging them against the contract, and that certain cash loans and other values elsewhere specified in the contract should increase in the same manner as if the premiums were paid by the insured; but that the insured might at any time cancel such premiums and be entitled to a reduction of twenty-five cents for each $1,000 of insurance upon his annual premiums. The insurance commissioner disapproved of the policy. *Held*, that the commissioner's disapproval was warranted, since the form of policy presented violated the provisions of § 34 in that it contained in one policy contracts for insurance of two of the classes therein named. *Ætna Life Ins. Co.* v. *Hardison*, 181.

13. A policy of life or endowment insurance, which provides for a grace of one month for the payment of every premium after the first, does not satisfy the requirement of St. 1907, c. 576, § 75, cl. 1, that a grace of thirty days shall be provided. *New York Life Ins. Co.* v. *Hardison*, 190.

14. A provision in a policy of life or endowment insurance that it "shall be incontestable, except for non-payment of premiums, from its date" is not a compliance with the requirement of St. 1907, c. 576, § 75, cl. 2, that every such policy shall contain "a provision that the policy shall be incontestable after two years from its date . . . except for non-payment of premiums and for engaging in military or naval service in time of war without the consent in writing of an executive officer of the company," and also is not in accordance with public policy. *Ibid.*

15. A provision in a policy that "This policy constitutes the entire contract between the parties, and is free of conditions as to residence, occupation, habits of life, and manner, time or place of death," is not a compliance with St. 1907, c. 576, § 75, cl. 3, requiring policies of life or endowment insurance to contain a provision "that the policy and the application therefor shall constitute the entire contract between the parties and that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties and that no such statement shall be used in defence to a claim under the policy unless it is contained in a written application and a copy of such application shall be endorsed upon or attached to the policy when issued." *Ibid.*

16. The provision of St. 1907, c. 576, § 75, cl. 8, requiring in policies of life or endowment insurance a table "showing in figures the loan values, if any," is satisfied if the policy contains, after a statement under a heading

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in large type, "Loans," a statement that "At any time while this policy is in force, the company will loan up to the limit secured by the cash surrender value," followed in a succeeding paragraph by a table headed "Cash Surrender Value," stating such values for each year of the policy. *Ætna Life Ins. Co.* v. *Hardison*, 181.

17. A policy of life insurance provided that, within one month from default in premium payments, the insured might surrender the policy for its cash surrender value (which was an amount computed according to certain tables, "less any indebtedness to the company herein") or surrender the policy for a "non-participating paid-up policy," or that, if he did not surrender the policy, the insurance would be automatically extended for a period equivalent to the extended insurance which the then cash surrender value of the policy would purchase. Its reinstatement clause provided that, in case of default in premium payments, the arrears might be paid in one month, or, if the insured within the month so requested, the arrears would be charged as an indebtedness against the policy, bearing interest, provided the entire indebtedness then outstanding would be within the cash surrender value, "or this policy may be reinstated at any time after the said month, upon evidence of insurability satisfactory to the company and payment of all arrears with interest thereon, provided, in any case, the policy has not been surrendered to the company." *Held*, that, although the provision as to reinstatement did not follow the exact language of St. 1907, c. 576, § 75, cl. 10, with regard to reinstatement requirements, and did not require before reinstatement the payment of "any other indebtedness" besides arrears of premiums, it nevertheless, in connection with the other provisions of the policy, secured to the insured all that was secured by the statute, and was not objectionable. *Ibid.*

Cancellation of Policy.

Procuring on Lord's day, in exchange for check for return premium, of agreement for cancellation of policy, renders such agreement invalid and not to be relied upon in defense to action on policy, see CONTRACT, 23.

Insurance Agent.

Mere taking out of policy of fire insurance at solicitation of insurance agent does not constitute latter insured's agent, see AGENCY, 1.

INSURANCE COMMISSIONER.

Duty of insurance commissioner with regard to statutory requirements as to substance and form of policies of life and endowment insurance, see INSURANCE, 9.

INTEREST.

1. If in a suit for an accounting the plaintiff admits that he had agreed to pay the defendant a liquidated amount on a certain date, but seeks to have certain unliquidated sums deducted therefrom, and findings are made that the plaintiff is entitled to certain deductions, interest should be

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charged against the plaintiff on the liquidated debt from the date when he agreed to pay it, and interest from the date of the bringing of the suit should be allowed him on the amount of deduction awarded him. *Childs* v. *Krey*, 352.

2. The rule of Foote v. Blanchard, 6 Allen, 221, that a purchaser of goods for cash payable on delivery in case of non-payment is chargeable with interest from the date of delivery, is not applicable to an action on an account annexed containing forty-five items amounting to about $3,000, of which two items amounting to over $700 are for work done, three items amounting to more than $160 are for part of a bill of a person named, the nature of which does not appear, and sixteen items amounting to more than $50 are for freight. In such a case, if the plaintiff recovers, interest is due from the date of the writ only. *C. W. Hunt Co.* v. *Boston Elevated Railway*, 220.

Suit in equity by inventor against manufacturer of invented article for accounting, in which defendant was not allowed under terms of agreement to charge interest on advancements by him, see CONTRACT, 6.

Where one holds property in trust and uses it as security for purpose of procuring loan to himself at four per cent, he nevertheless in suit by beneficiary for accounting should be charged and beneficiary credited with six per cent on amount he thus received from use of property, see EQUITY JURISDICTION, 9.

Delay in trial of petition for damages resulting from taking of certain water rights for the supplying of Rockport with water under St. 1894, c. 78, § 4, when either party might have brought case to trial, held not to prevent interest on award from running from date of actual taking, see DAMAGES, 5.

INTOXICATING LIQUORS.

The owner of the fee in a public street forty feet wide, which is immediately in front of certain premises, is an "owner of real estate within twenty-five feet of the premises," against whose objection, made in accordance with R. L. c. 100, § 15, no license to sell intoxicating liquors to be drunk on such premises can be granted. *Moran* v. *Gallagher*, 486.

INVITED PERSON.

Rights of automobile driver's guest injured in collision, see NEGLIGENCE, 17.

JUDGMENT.

While appeal from decree for plaintiff in suit in equity was pending in this court, decree was ordered vacated to allow amendment by defendant setting up judgment of court of another jurisdiction, rendered after appeal here was taken and alleged by defendant to be bar to plaintiff's claim, see EQUITY PLEADING AND PRACTICE, 8.

Judgment of Land Court, on petition for registration of title to land which

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is bounded by private way bounding other lots also, fixing lines of way where it bounds on land whose title is registered, does not fix lines of way as to other lots, see LAND REGISTRATION.

JURISDICTION.

Indictment or complaint for commission of crime cannot lawfully be placed on file without consent of defendant, see PRACTICE, CRIMINAL, 8.

Under R. L. c. 217, § 84, c. 220, § 2, court has power to dismiss case against person charged with crime if, after season of probation, object of probation seems to have been accomplished, see PRACTICE, CRIMINAL, 7.

Jurisdiction of State Court with regard to construction and enforcement of instrument transferring rights under letters patent, see EQUITY JURISDICTION, 3.

JURY AND JURORS.

Application of principle that verdict of jury must be conscientious verdict of each juror to case where instructions of judge were held not sufficiently to have emphasized it, see PRACTICE, CIVIL, 7.

LABOR UNION.

Rulings by judge, presiding at trial of action for breach of contract to deliver coal, regarding effect of "strike" clause in contract, see PRACTICE, CIVIL, 8.

Effect of such clause in contract, see CONTRACT, 26.

President and temporary secretary of district council of various labor unions held not to have been proved to have sent to member of one of co-ordinate unions letter threatening him with fine for working for certain firm with whose business they were enjoined from interfering, see UNLAWFUL INTERFERENCE, 7.

LACHES.

See EQUITY JURISDICTION, 1, 12; TRUST, 8.

LAND COURT.

Judgment of Land Court, on petition for registration of title of land which is bounded by private way bounding other lots as well, fixing lines of way where it bounds on land whose title is registered, does not fix lines of way as to other lots, see LAND REGISTRATION.

LANDLORD AND TENANT.

Covenant in Lease.

Covenant by lessee of real estate at end of term to "yield up" premises "in good tenantable repair in all respects" held not to require lessee to repair defective coal hole before end of term, see *post*, 7.

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Landlord's Liability to Tenant.

1. It is not negligence for the owner of a tenement house of four stories to place a mat in the passageway used in common by the occupants of all the tenements on the upper three stories and in front of a door which leads into a tenement which he occupies on the second floor, and not to warn the tenants of its presence, although he knows that, by the terms under which the tenements are let, the passageway is left dark during a part of the night. *McGowan* v. *Monahan*, 296.
2. In the absence of an agreement on the part of the owner of a tenement house to keep the passageway used in common by the occupants of all the tenements lighted, the landlord's duty to each of the tenants is to keep the passageway in the condition in which it apparently was at the time of the letting of the premises to such tenant, and if, at the time of such letting, the passageway was not lighted in the early hours of the morning, such tenant cannot recover from the landlord for injuries resulting from an accident caused by his tripping at such an early hour on a mat in the passageway on account of darkness. *Ibid.*
3. At the trial of an action against the owner of a house containing six tenements, by the occupant of one of the tenements, to recover for injuries alleged to have been received by the plaintiff by reason of a fall upon ice which had accumulated upon some steps which were used in common by the occupants of all of the tenements, there was testimony tending to show that, a short time before the accident, the defendant had repaired the steps, that the ice had accumulated upon the steps because of water which fell thereon from a "gooseneck" which projected from a gutter on the eaves at the top of the house and that there was no conductor attached to the "gooseneck" to prevent the water from falling upon the steps. The premises were in the same condition as to the "gooseneck" at the time when the plaintiff became a tenant as they were when the ice accumulated on the steps, and the condition was obvious. *Held*, that the defendant was not liable, since the plaintiff hired the tenement with reference to its obvious condition at the time of the letting. *Hannaford* v. *Kinne*, 63.

Liability of Landlord to Third Person.

4. If the owner of real estate leases it with a nuisance upon it, of which he knows or ought to know, and takes no agreement from the tenant to abate the nuisance, he is liable to a third person who when exercising due care suffers injury from the nuisance. *Hill* v. *Hayes*, 411.
5. In an action against the owner of a building leased to a tenant, for personal injuries caused by the defective condition of the cover of a coal hole in the sidewalk adjoining the defendant's building and used in connection with it, where it is material for the plaintiff to show that the defect existed at the time the lease was made, and no one testifies from actual observation made at that time as to the condition of the coal hole then, the plaintiff can show its defective condition before the time of the letting and that this condition was substantially the same up to the time of the accident. *Ibid.*

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6. If the owner of a house leases it when the coal hole in the adjoining sidewalk used in connection with the house is in such a condition as to constitute a nuisance, and there is no way to make the coal hole proper and safe for travellers except by putting in a new casting or covering or a new pin, and the owner through his agent, having been notified of the defective condition of the coal hole, makes an attempt to have it repaired but does not furnish a new cover or a new pin and leaves it in a condition dangerous for public travel, and the lease contains no provision requiring the tenant during the term to put or keep the premises in any condition other than that in which they were at the beginning of the term, the owner is liable to a traveller who in the exercise of due care is injured from falling into the coal hole by reason of the defective cover. *Hill* v. *Hayes*, 411.

7. Where a lease contains a covenant by the lessee that he will keep the premises in as good condition as they are in at the commencement of the term or may be put in by the lessor during the continuance thereof, and also covenants that he will at the expiration of the term "yield up" the premises to the lessor "in good tenantable repair in all respects, reasonable wear and use thereof and damage by fire and other casualties excepted," the last named covenant does not impose upon the lessee the duty of keeping the premises in good tenantable repair during the term. It is fulfilled if they are yielded up in that condition at the end of the term, and, if there is a nuisance on the premises at the time the lease is made, this covenant does not require the lessee to abate it until at least just before the end of his occupancy. *Ibid.*

LAND REGISTRATION.

At the hearing on a petition for registration of the title to land bounding on a private way which had been laid out according to a plan by a company which was the common grantor of the petitioner and of the respondent, and which was used in common by all whose land was bounded thereon, it appeared that the respondent owned land abutting on the way and opposite to that of the petitioner, that the respondent was the successor of the company which laid out the way and owned the original plan and all the data regarding it, that a like petition previously had been filed by one S., who was the owner of other land bounding on the same way, of which both the petitioner and the respondent in this case were given notice, but that, after he had examined such petition, the respondent, finding that the plan submitted with it purported to be in accordance with his plan so far as the way was concerned, entered no appearance in that case, that the judge of the Land Court was not satisfied with the location of the way as shown on the plan filed by S. with his petition, and advised S. to secure the original data, which were in the possession of the respondent's engineer, that such engineer refused to give such data and thereupon S. procured data elsewhere from which a new plan was made, and the Land Court granted S.'s petition, locating the way so far as it bounded on his lots according to S.'s new plan. The location was erroneous, but, if the

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Land Court had had the data which were in the possession of the respondent's engineer, no mistake would have been made. It did not appear that the respondent ever was asked for or refused to give such data. The petitioner in this case sought to have the way located as it had been decided to be in S.'s case. The respondent contended that it should be located as it actually was laid out, namely, as it was on the original plan. *Held*, that the decision in S.'s case applied only to S.'s lots and the part of the way on which they bounded; *and*, that there was nothing in the circumstances to prevent the respondent's insisting upon having the way properly located where it bounded on his land. *Pollard* v. *Burchard*, 376.

LIBEL AND SLANDER.

1. A fair report in a newspaper of pending judicial proceedings is privileged, and this privilege extends to the publication of the charges made in a bill in equity where a special order has been made by the court that the defendants shall appear and show cause why they should not be enjoined. *Kimball* v. *Post Publishing Co.* 248.
2. The publication in a newspaper of a fair report of the proceedings at a business meeting of the stockholders of a private corporation is not privileged, and it is no defense to an action for libel for such a publication that the matter complained of as libellous was contained in the remarks of a stockholder at the meeting which he was privileged to make because they related to a matter in which he and the other stockholders had an interest. *Ibid.*
3. In an action for libel against the proprietor of a newspaper for publishing a report of a meeting of the stockholders of a private corporation in which the plaintiffs were charged with procuring fraudulently a majority of the stock of the corporation, it is no defense that the charge is the same as one made in a bill in equity in a pending suit, a statement of which was published at the same time and was privileged as a fair report of a judicial proceeding. *Ibid.*

LICENSE.

License to sell intoxicating liquors to be drunk on certain premises cannot be granted, under R. L. c. 100, § 15, against objection of owner of fee in public street forty feet wide in front of premises, see INTOXICATING LIQUORS.

LIEN.

Lien of attorney at law on funds recovered for client held not enforceable under circumstances in suit of client to restrain unauthorized application of funds by attorney, see EQUITY JURISDICTION, 21.

Railroad corporation may refuse to deliver pedler's pack to owner, who has attempted to take it with him on journey as personal baggage, until reasonable charge for its transportation is paid, see CARRIER, 4.

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LIGHT AND AIR.

Description of land in deed as bounding on "an open court" and grant in deed of right of way "in along or over" such court held not to create easement of light and air over court, it not appearing that such easement was indispensable to reasonable enjoyment of land conveyed, see EASEMENT, 1.

Interference with light, air, and prospect by railroad company in abolition of grade crossing is no ground for recovery of damages by landowner unless in course of abolition some land or easement in land was taken, or private way changed or discontinued, see DAMAGES, 1–4.

The owner of the fee in a lot of land, who arches over and builds above a passageway crossing his lot in which the owners of other lots have rights of way, must leave such openings for light and ventilation as are necessary for the convenient use of the way by the owners of the easement, see EQUITY JURISDICTION, 22.

LIMITATIONS, STATUTE OF.

1. Under R. L. c. 149, § 35, requiring that an action against the sureties on the bond of a guardian should be commenced within four years from the time of the discharge of the guardian, the death of the guardian is a "discharge of the guardian" within the meaning of the statute. *Hill* v. *Arnold*, 109.

2. Under R. L. c. 149, § 35, an action against the sureties on the bond of the guardian of an insane person must be commenced within four years from the time of the discharge of the guardian, unless at the time of such discharge the person entitled to bring such action is out of the Commonwealth, and the fact that the ward has been under the disability of insanity during the whole of the period does not affect the application of the statute. *Ibid.*

3. The general provision of R. L. c. 202, § 7, that if a person entitled to bring an action is a minor, or is insane or imprisoned when the right to bring such action first accrues, the action may be commenced within the time limited by the statute of limitations after the disability is removed, is subject to the modification made by § 18 of the same chapter, that "if a special provision is otherwise made relative to the limitation of any action, the provisions of this chapter which are inconsistent therewith shall not apply." R. L. c. 149, § 35, in regard to the limitation of actions against the sureties on a bond given by a guardian, makes such a special provision. *Ibid.*

Provision of R. L. c. 106, § 75, that actions under §§ 71–73 must be brought within one year after accident which causes injury to employee is not mere statute of limitation, but is condition precedent to bringing of action, and non-compliance with it can be shown in defense under answer of general denial, see PLEADING, CIVIL, 4.

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LORD'S DAY.

Agreement to cancel insurance policy is invalid if signed and delivered on Lord's day, see CONTRACT, 23.

LOWELL.

Acts of water board of Lowell in compelling users of water for private fire service systems to use meters supplied by city at owner's expense held within their powers and reasonable under circumstances, see MUNICIPAL CORPORATIONS, 1.

MANDAMUS.

Petition for writ of mandamus, and not bill in equity, is proper remedy for one to whom gas company has refused, contrary to provisions of R. L. c. 58, § 17, to supply gas, see GAS COMPANY, 2.

Mandamus in some cases is proper remedy in case public officer refuses to reach conclusion based on correct application of law as to question committed by statute to his decision, see EQUITY JURISDICTION, 19.

Writ of mandamus will not be issued to compel Chilmark to maintain school on island of Noman's Land for benefit of two children of petitioner, reasonable facilities and transportation being offered them to attend school on main land, see SCHOOL.

MASTER AND SERVANT.

See AGENCY.

MECHANIC'S LIEN.

Certificate.

1. One, who had an entire contract with the owner of certain land for the performance of labor and furnishing of materials for the construction of a building thereon, performed labor, and then filed in the registry of deeds the certificate required by Pub. Sts. c. 191, § 6, stating that he had a claim for both labor performed and materials furnished, but not itemizing the claim for labor. Afterwards he brought a petition to establish a lien for the labor performed only, at the trial of which it was agreed that there was no intention on the part of the petitioner to mislead, and that the respondent was not misled, "by reason of an inaccuracy in stating or failing to state the contract price, the number of days of labor performed or furnished and the value of the same." *Held*, that the inaccuracies in the certificate did not prevent the establishment of the lien. *Brown* v. *Haddock*, 480.

Consent of Owner.

2. Under Pub. Sts. c. 191, § 1, now R. L. c. 197, § 1, the consent of the owner of land, or of any person having authority from or rightfully acting for such owner, which is required for the establishment of a mechanic's lien for labor performed or furnished or for materials furnished in the erection, alteration, repair or removal of a building or structure upon

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such land, is consent to the performance of the work or to the furnishing of the materials, not to the creation of a debt for such labór or materials. *Brown* v. *Haddock*, 480.

3. At the trial of issues framed for a jury regarding two petitions for the establishment of liens for work performed, and one for labor performed and materials furnished, in the construction of buildings upon certain land, there was evidence tending to show the following facts: In June of a certain year one B. owned the land. At that time one H. made an agreement in writing with a certain bank that the bank should make loans to H. in instalments as work upon buildings to be erected by him on the premises in question progressed, the loans to be secured by a mortgage upon the premises. In July of the same year B. agreed in writing with H. to sell to him the land and to convey it on or before January of the next year "free from all incumbrances, except" a restriction as to the nature of buildings to be erected thereon, H. to pay a part of the purchase price in cash, and B. to take a mortgage on the premises as security for the payment of the remainder. Thereafter, and before conveyance by B. to H., they together examined plans for the buildings, and B. approved of them, knew that H. was to procure money from the bank for their construction, and knew that work was being done on the premises and that materials were being furnished for the erection of the buildings by various parties under contracts with H. Such contracts were made by the petitioners and all work for which liens were claimed by two of them was performed and two stories of two buildings on the premises were put up before B. conveyed to H. All work done and materials furnished by the third petitioner was done and performed after such conveyance. At the same time that the conveyance was made, H. gave a first mortgage to the bank and a second mortgage to B. Subsequently, and before the petitions were filed, B. entered to foreclose his second mortgage. No notice in writing had been given to B. by any of the petitioners before any of the labor was performed or furnished or the materials furnished. *Held*, that the jury were warranted in finding that the labor performed and materials furnished by the petitioners were performed and furnished with the consent of B., who was the owner of the land when the petitioners' contracts were made with H., also that the seisin of H. "was not instantaneous as against B.," and that the liens should be established. *Ibid.*

MEDICINE.

The science of medicine includes a knowledge, not only of the functions of the organs of the human body, but also of the diseases to which such organs are subject and of the laws of health and the mode of living which tend to avert or overcome disease, as well as of the specific methods of treatment that are most effective in promoting cures, and is not limited to that department of knowledge which relates to the administration of medicinal substances. *Commonwealth* v. *Jewelle*, 558.

Indictment against one charged with practising medicine without being lawfully authorized or registered to do so, see PHYSICIANS AND SURGEONS, 1–3.

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MEIGS ELEVATED RAILWAY COMPANY.

Unsuccessful attempt by stockholders of Meigs Elevated Railway Company to have incorporators of Boston Elevated Railway Company declared trustees for them of $400,000 alleged to be proceeds of transfer by such incorporators of charter of the Boston Elevated Railway Company, see TRUST, 1.

MORTGAGE.

Discharge.

At the hearing upon a bill in equity by a trustee under a will seeking to have an alleged assignment by a former trustee to the defendant of a part of the principal of the trust, consisting of a mortgage note for $6,000 and the mortgage securing it, set aside, it appeared that the will gave the trustee no power to change the form of an investment without an order of the Probate Court, that, before the time of the alleged assignment, the mortgage note in question being overdue, the trustee demanded payment from one to whom the mortgagor had conveyed the equity of redemption and agreed with the owner's agent that, if the agent would procure funds and pay the mortgage, he would allow him $50. There was evidence tending to show that the owner of the equity through his agent thereupon applied to the defendant for a loan upon the real estate of $6,000, that he finally was allowed a loan of $5,500, that the defendant consented to accept the verification of the title by the owner's conveyancer, who reported that it was subject to two mortgages, the one held by the trustee being the first; that thereupon the defendant delivered to the owner's conveyancer a check payable to the conveyancer's order for $5,500, the conveyancer indorsed the check to the trustee, the agent of the owner paid the trustee $450, and the trustee indorsed the note to the defendant without recourse and delivered it to him, and executed and delivered to the defendant, without having procured any order from the Probate Court, the assignment of the note and mortgage in question and afterwards misappropriated the $5,950 received by him; that, at the time of the passing of papers, the defendant received no note or written acknowledgment of a debt from the owner, but that afterwards the owner signed and gave to the defendant a receipt for the $5,500 paid by it and an extension of the mortgage, which contained an agreement by him to pay the mortgage debt at the end of the extended period and the interest thereon meanwhile; that the entries on the books of the defendant purported to show a loan to the owner. The single justice found as a fact that the defendant attempted to purchase the note and mortgage from the trustee, and, since the trustee had no power to sell it, made a decree for the plaintiff. The defendant appealed, and, on consideration of all the evidence, which was reported by a commissioner, it was *held*, that the transaction was not a sale of the mortgage to the defendant, but that in effect the trustee merely received from the owner payment of the mortgage

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debt, which was within his power. *Bremer* v. *Columbian National Life Ins. Co.* 344.

Parol agreement of owner of land made upon conveying it that grantee should hold it as security for payment of debt he owed grantor may be discharged by subsequent parol agreement which leaves title absolute in grantee, see TRUST, 10; EQUITY JURISDICTION, 12.

Where one shortly before being declared bankrupt in 1876 agreed that land, which he had conveyed by deed absolute in form to one who held it subject to parol agreement that it should be security merely, should be applied as payment *pro tanto* of debt secured, which exceeded value of land, there was no preference, see BANKRUPTCY, 2.

Foreclosure.

Foreclosure of mortgage of household furniture which amounted to conversion because mortgage was not given by owner of property, see AGENCY, 2.

What included in Mortgage of Real Estate.

Consideration of what articles are attached to realty so as to pass as part thereof on foreclosure of mortgage of realty, see FIXTURES, 1, 2.

Will held not to exhibit intention that real estate devised to one should be subjected to payment of mortgage upon it before personal property and real estate devised by residuary clause to another had been exhausted, see DEVISE AND LEGACY.

Suit in equity for accounting brought by one who formerly had owned equity of redemption of certain property which, at his request and for his benefit, defendant had purchased at foreclosure sale, involving questions of interest and of allowances proper to be credited to defendant for disbursements with regard to property, see EQUITY JURISDICTION, 9–11.

MUNICIPAL CORPORATIONS.

Officers and Agents.

1. Acting under St. 1855, c. 435, §§ 3, 5, the city of Lowell by ordinance vested in its water board the power to conduct the city's waterworks, and, among other things, to "regulate the use of said water, and establish and collect the prices to be paid therefor, and also to do any other acts or things necessary or convenient and proper." In 1907 reasonable means of extinguishing fires were furnished by the public hydrants, but the city had not required and did not purpose to require any payment for water used in private fire service systems for the extinguishment of fires. Its water board however made a regulation requiring the measuring of water from the city's waterworks used in such systems, and the installation by the city, at the owners' expense, of meters to be used for that purpose. The principal objects of the regulation were to prevent the surreptitious or careless withdrawal of water for other purposes, and to check wastage.

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The water board enforced the regulation gradually, beginning with those who used water most extensively for such private fire service systems. The owner of such a system brought a bill in equity against the city to enjoin the enforcement of the regulation. *Held*, that the bill must be dismissed, since the regulation was reasonable and was within the powers of the water board, and since the board had not unjustly discriminated against the plaintiff in its enforcement. *Shaw Stocking Co.* v. *Lowell*, 118.

Foreman of yard of municipal board of health is engaged in labor service of city and is not holder of office within meaning of that term in civil service rules, see CIVIL SERVICE, 1.

Power of overseers of poor under R. L. c. 81, § 38, to prosecute in name of town bill in equity to compel grandfather to contribute toward support of pauper grandchildren, see OVERSEERS OF THE POOR, 1–3.

Certain conditions, imposed by selectmen of Clinton as conditions under which location would be granted to Worcester and Clinton Street Railway Company in 1877 under Pub. Sts. c. 113, § 7, upon its organization held to have been within power of selectmen, and, upon acceptance by corporation, valid and enforceable, see STREET RAILWAY, 3, 4.

Failure of town authorities to cause description and plan of land taken to widen public street to be filed in registry of deeds as directed by R. L. c. 48, § 97, within sixty days after vote accepting relocation does not affect validity of taking of land or of widening of street, see WAY.

By-laws and Ordinances.

2. A by-law of a town, providing that "No person shall permit water from the eaves or leader pipes of any building owned or cared for by him to be discharged upon the sidewalk — or make or permit any drain, sluice, gulley or conduit upon his land to discharge water upon the sidewalk —" not only prohibits a direct and immediate discharge of water upon a sidewalk without any intervening agency, but includes as well cases where a house standing back from the street is so fitted with eaves and leader pipes that the collected water flows down an inclined concrete walk on the land of the householder to the sidewalk of a highway. *Field* v. *Gowdy*, 568.

At trial of action for injuries caused by plaintiff slipping on ice formed from water collected on sidewalk because of violation of such by-law, by-law is admissible in evidence, see NUISANCE, 2.

Street Watering.

Assessment of tax for street watering purposes, see TAX, 2–7.

MUNICIPAL COURT.

See DISTRICT, POLICE AND MUNICIPAL COURTS.

NATIONAL BANK.

At the trial of an action, brought by the receiver of a national bank against one alleged to have been a shareholder therein, to collect the amount of an

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assessment ordered by the comptroller of the currency under U. S. Rev. Sts. §§ 5151, 5234, it appeared that a receiver had been appointed, that about two years before his appointment the twenty year period of succession of the bank had expired, that proper proceedings under U. S. St. 1882, c. 290, were taken and the period of succession was extended for twenty years. Section 5 of that statute provides that, in case of such extension, any shareholder not assenting "may give notice in writing to the directors within thirty days . . . in which case he shall be entitled to receive . . . the value of" his shares "to be ascertained by an appraisal made by . . . three persons, one to be selected by such shareholder, one by the directors, and a third by the first two; and, in case the value so fixed shall not be satisfactory to any such shareholder, he may appeal to the comptroller . . . who shall cause a reappraisal to be made, which shall be final." Acting under § 5, the defendant within the thirty days allowed had given to the directors the required notice and named an appraiser, and the directors named as their appraiser the president of the bank, who was a director and large stockholder. Thereafter the defendant made all reasonable efforts to have a third member appointed, and employed counsel for that purpose, who had correspondence with an attorney of the bank, but to no purpose. The defendant did not surrender his certificate which had printed upon it a provision of the by-laws that the shares it represented were transferable only on the books of the bank in person or by attorney on the surrender of the certificate. Dividend checks were sent to the defendant, which he refused to accept and returned, asserting that he was not a shareholder. He did not use or assert any rights or privileges as a shareholder after the time of the extension of the period of succession. *Held*, that the action could not be maintained, since, at the time the assessment was levied, the defendant had ceased to be a shareholder. *Apsey* v. *Whittemore*, 65.

NEGLIGENCE.

Due Care of Plaintiff.

1. If the duties of a freight brakeman, who is riding upon the side of a freight car moving slowly in a yard crowded with piles of merchandise, require him to turn his back toward the direction in which the car is moving, this does not relieve him from the duty of exercising care for his own protection, even if under these conditions he is not required to give more attention than usual to his personal safety. *Flansberg* v. *Heywood Brothers & Wakefield Co.* 410.

Of workman who did not understand English killed by falling pole of which he had not been warned, see *post*, 3.

Of engineer who ran engine around curve at speed knowing of defect which made it liable not to keep on track on curve, see *post*, 11.

Of one riding in automobile as guest of driver, see *post*, 17.

Of conductor of open electric street car who was struck by automobile while he was on running board of car collecting fares, see *post*, 20.

Failure to use best means of escape in moment of sudden peril not necessarily want of due care, see *post*, 3.

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Assumption of Risk.

By employee, see *post*, 2, 3, 9.

Imputed.

Case where negligence of one driving automobile was held not to be imputed to guest therein, see *post*, 17.

Invited Person.

Negligence of driver of automobile held not to be imputed to guest therein, see *post*, 17.

Employer's Liability.

Assumption of risk.

2. The proprietor of a factory or machine shop owes no duty to a laborer employed to work there to change or improve any of the obvious conditions of his workshop or machinery. The laborer accepts them as they are at the time of his employment. *Powers* v. *Wyman & Gordon Co.* 591.

3. In an action under R. L. c. 106, § 73, by the widow of a workman against a general contractor, for causing the instantaneous death of her husband, while he was working as one of a gang of men in the employ of the defendant in attempting to erect a heavy pole, from the pole suddenly falling upon him, there was evidence that the plaintiff had been in this country about two months, that he did not speak or understand English, that before his employment by the defendant he had worked as a laborer in shovelling and picking, and that he went to work on the job the day before he was killed, having had previously no experience in this kind of work. There was nothing to show that he was not doing in the usual way the work which he had been set to do, and there was evidence that, if any warning was given by the defendant's superintendent, the plaintiff's husband failed to understand it, and that from want of experience he did not appreciate the danger of poles falling. There also was evidence warranting a finding that his failure to avoid the danger might have been due to confusion on his part resulting from the imminence of the peril and his want of experience. *Held*, that the plaintiff's husband did not assume the risk of such an accident, and that the question of his due care was for the jury, upon which they might consider the fact that the other workmen escaped and that the plaintiff's husband perhaps might have escaped also if he had been less confused or had moved more quickly, but that it could not be ruled as matter of law that he was wanting in due care because in a moment of sudden peril he failed to use the best means of escape. *Di Bari* v. *J. W. Bishop Co.* 254.

By carpenter engaged in tearing down roof, he never before having done such work, of danger of falling through roof, see *post*, 9.

Ways, works and machinery.

Case where evidence held insufficient to warrant finding that employee's injury resulted from defect in ways, works or machinery of employer, see *post*, 6.

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Superintendence.

4. In an action by a carpenter against his employer for personal injuries caused by some small stones and mortar from the bottom of part of an old cellar wall falling upon him while he was working beneath the wall in shoring up the earthen sides of a cellar which was being excavated preparatory to the construction of a large office building, it appeared that the new cellar was to be considerably deeper than the old one, and that a part of the old wall, which was to be preserved and kept in position so as to form a part of the new wall, was braced by planks placed against its face, and was supported by a girder placed under it, the girder resting at each end upon parts of the new wall and in the middle upon an upright post, that this part of the old wall was made of mortar and rough granite stones, both great and small, and was two or three feet thick, that the girder supporting it was only from twelve to fourteen inches wide, so that about one half of the bottom of the wall projected over the girder, that the plaintiff, who was an experienced carpenter, was one of the night gang, that when he went to work that night he asked the "night boss" whether the old wall was "real secure," that the boss replied, "Yes, it is all right," and that it looked all right to the plaintiff, that the plaintiff worked under the wall much of the time that night, shoring the sides of the excavation as it proceeded, and that about seven o'clock in the morning some small stones and mortar became detached from the bottom of the wall and fell upon him, causing the injuries sued for. There was nothing to show that the falling of the stones was due to any changes made that night. There was evidence that the "night boss" was a person exercising superintendence. *Held*, that the jury properly might find that the answer of the superintendent that the wall was all right was intended by him and was understood by the plaintiff to mean that the wall was braced and supported securely so that no part of it would fall into the cellar, that the plaintiff, relying upon that assurance and seeing nothing inconsistent with it, proceeded to work under the wall in the exercise of due care, that there was negligence in not providing a suitable place for the plaintiff to work, and that this was the negligence both of the superintendent and of the defendant. *Berube* v. *Horton*, 421.

Of person in charge of locomotive engine or train.

5. Under R. L. c. 106, § 71, cl. 3, a manufacturing corporation, which owns and operates as its private property in its factory yard switching tracks and an engine, is liable for personal injury caused to one of its employees and due to negligence on the part of a person in its employ who is in charge or control of such engine upon such tracks. *Hines* v. *Stanley G. I. Electric Manuf. Co.* 522.

6. In actions by the administratrix and the widow of one who had been employed by the defendant, a manufacturing corporation, in which recovery was sought for conscious suffering and death of such employee, the declaration alleged that the accident was due to the employee's having been run over by a switching engine owned and operated by the defendant

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in its factory yard, and contained counts alleging in substance that the injury was caused by a defect in the ways, works and machinery of the defendant, by negligence on the part of the superintendent, by negligence of the defendant in failing to give the employee suitable warning and instructions and in failing to employ a sufficient number of workmen to operate the railroad tracks, switches and appliances, and also a count under R. L. c. 106, § 71, cl. 3, alleging that the accident was due to the negligence of a person employed by the defendant who was in charge of a locomotive engine and train in its yard. At the trial, the plaintiff's evidence tended to show that there were various tracks in the yard in question, but no turntables and no "Y," that the engine which ran over the plaintiff's intestate was owned by the defendant and operated by a person in its employ, that it was customary, whenever the engine was moved, to ring its bell, and that the engineer had been instructed to ring the bell when passing over a crossing; that the plaintiff's intestate was the caretaker of the yard, and it was his duty to gather up rubbish and keep the drains open "all over the yard," that, just before he was run over, he was engaged in clearing out a culvert which was behind the engine as it stood still, partly on a crossing, and that he was bending over, astride of one of the railroad rails, with his back to the engine, that the engine started without the bell being rung and without any warning to the plaintiff's intestate, and he was run over. The presiding judge, at the close of the plaintiff's evidence, directed a verdict for the defendant; and the plaintiff excepted. *Held*, that the exception should be sustained, since there was evidence from which the jury would have been warranted in finding that the plaintiff was in the exercise of due care, and since, although there was no evidence which would warrant submitting the case to the jury on the other counts, there was evidence warranting a finding that the plaintiff's intestate was run over and killed by reason of the negligence of a person in the defendant's employ who was in charge of a locomotive engine or train upon a railroad. *Hines* v. *Stanley G. I. Electric Manuf. Co.* 522.

Duty to furnish sufficient number of workmen.

7. It is the duty of an employer toward his workmen to furnish a sufficient number of workmen to do the work required of them. *Di Bari* v. *J. W. Bishop Co.* 254.

8. In an action under R. L. c. 106, § 78, by the widow of a workman against a general contractor, for causing the instantaneous death of her husband, while he was working in the employ of the defendant as one of a gang of six men under a foreman in attempting to erect a heavy pole, thirty feet high above the ground and sixteen or eighteen inches in diameter at its base, from the pole suddenly falling upon him, there was evidence warranting the jury in finding that the defendant did not furnish a sufficient number of men to enable those engaged in erecting the pole to do so in safety and that such negligence was the proximate cause of the death of the plaintiff's husband. *Held*, that the question of the defendant's negligence was for the jury. *Ibid.*

Case where evidence held insufficient to warrant finding that employee's in-

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jury resulted from failure of employer to furnish sufficient fellow workmen, see *ante*, 6.

Dangerous place to work.

9. If a journeyman carpenter of twenty years' experience applies for work to a contractor who is engaged in tearing down the roof of an old building to make room for a new structure, the carpenter having never before worked at tearing down a roof but this fact being unknown to the contractor, and is set to work at once on the roof, being given an iron bar and told to rip off the boards and throw them in a certain place and then to take down the rafters, and if while proceeding about this work in his own way he steps on a rafter which proves to be rotten and breaks, and he falls through the roof and is injured, and if it appears that the rafters were painted on the sides and bottom so that the natural wood could be seen only as the boards were taken off the top, and that the place where the rafter broke was exposed by other workmen who had preceded this carpenter in the work and was open to sight, the carpenter cannot recover from his employer for his injuries, he having assumed the risk of such an accident when he entered the employ of the contractor to assist in tearing down the old roof. *Boisvert* v. *Ward*, 594.

10. If a laborer employed in a workshop, where there is a steam trip hammer which is set in motion by pressing down a pedal extending in front of and around two sides of the base, on the second day of his employment, being ignorant of the existence of the pedal, is told by a person, who may be acting as a superintendent, to go with a loaded wheelbarrow between the trip hammer and a pile of dies two or three feet high, where there is a space "just wide enough to wiggle the barrow through," and if in attempting to do this the laborer strikes the pile of dies and is thrown down, and in some way his foot comes down on the pedal and sets the machine in motion and the hammer comes down and cuts off one of his fingers, he cannot recover from his employer for this injury, which happened by a pure mischance for which no one was liable and which could not reasonably have been anticipated either by the employer or his superintendent, who therefore were guilty of no negligence in failing to warn or instruct the laborer in regard to such a danger. *Powers* v. *Wyman & Gordon Co.* 591.

Action by carpenter against employer to recover for injuries alleged to have been received while at work shoring up earthen sides of cellar because some stones from old wall fell on plaintiff after superintendent had assured him that it was secure and all right, see *ante*, 4.

Defective and dangerous machinery or appliances.

11. At the trial of an action against a railroad company by an engine driver in its employ, to recover for personal injuries received by him because of the derailment of the engine which he was driving, alleged to be due to a defective condition of the engine, the following facts were testified to by the plaintiff: He not only was experienced as an engine driver, but also was experienced in and familiar with the mechanical construction

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of engines. Three to five days before the accident he reported to the defendant the defective condition of the engine, which was that the breast beam had sunk so low that the forward "truck frame was down on the boxes." He noticed then that the flanges of the front wheels had cut into the breast beam, and realized that the result of such a condition was that the front wheels were likely to become fixed and unable to turn in rounding a curve. The accident happened on a trip from Plymouth to Boston. He had examined the engine before starting from Plymouth and had observed that it had not been repaired. At the time of the derailment he was running at the rate of from forty-four to forty-eight miles an hour around a three degree curve. He also testified that he did not appreciate that there was any danger in running the engine in such a condition at such a rate around such a curve. *Held*, that the plaintiff's injuries were as much due to his own as to the defendant's negligence, and that as a matter of law the plaintiff, with his knowledge and experience, was not in the exercise of due care if he did not appreciate the danger of his running the engine under the circumstances as he did. *Adams* v. *New York, New Haven, & Hartford Railroad*, 476.

Failure to warn.

Case where evidence was held insufficient to warrant finding that employee's injury resulted from failure to warn him of impending danger, see *ante*, 6.

Requisites to maintenance of action under R. L. c. 106, §§ 71–73, 75.

Notice to employee under R. L. c. 106, § 75, alleging negligence of employer, includes not only his personal negligence but also negligence of his superintendent within scope of employment, and, in action brought after such notice, negligence of both may be proved, see EMPLOYERS' LIABILITY ACT.

Declaration in action under employers' liability act may be amended more than year after happening of accident by addition of count stating as additional ground of liability of employer negligence of superintendent, see PRACTICE, CIVIL, 2.

Defense that action was not brought within one year, as required by R. L. c. 106, § 75, can be relied on in defense although answer is general denial only, see PLEADING, CIVIL, 4.

Street Railway.

Injury to passenger.

12. The possibility of an electric car giving a jerk is an incident of travel which every traveller must expect. To make out a case of negligence on the part of the corporation operating the car it is necessary to show that the jerk was due to a defect in the track or to negligence in the operation of the car. *McGann* v. *Boston Elevated Railway*, 446.

13. It is no evidence of negligence on the part of a street railway company toward a passenger who was being transported in one of its cars, that, when the car was between two hundred and fifty and three hundred feet from the stopping place where the passenger had signalled to have it stop

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and had begun to "slow down," it started ahead quickly "with a sudden jerk or jump," and that the passenger, who had gone to the platform to get off when the car reached the stopping place, was thrown off and injured. *McGann* v. *Boston Elevated Railway*, 446.

14. At the trial of an action against a street railway company to recover for personal injuries alleged to have been received by the plaintiff from his being thrown from a car of the defendant by its sudden and negligent starting as he was on the step about to alight, it appeared that the car was approaching a point where the track was intersected by another track from a cross street, and had lessened its speed, and the plaintiff testified that the car started up with such "terrific" force that, holding on to the handle beside the step, he was swung around against the body of the car, and a witness for the plaintiff testified that, when the plaintiff got upon the lower step, "almost immediately the car shot across the street," dragging the plaintiff three or four feet before his hold was broken. The car stopped at its regular stopping place one hundred and twenty feet from where the plaintiff was thrown. *Held*, that there was no evidence which would warrant a finding that the car was started up negligently. *Stevens* v. *Boston Elevated Railway*, 471.

15. At the trial of an action against a street railway company to recover for personal injuries alleged to have been received by the plaintiff from his being thrown from a car of the defendant by its sudden starting as he was standing on the step about to alight, while the car was moving slowly, at a place which was not a regular stopping place for the defendant's cars, the plaintiff contended that the defendant, by lessening the speed of the car, waived the rule, implied from the establishment of regular stopping places, that passengers should alight at such stopping places only; and a witness for the plaintiff was asked "What, if anything, do you know with regard to the practice of cars stopping [where the plaintiff attempted to alight] for the purpose of letting off passengers?" He answered, "I have on more than one occasion left the car there when the car has been stopped." *Held*, that the answer, not being responsive to the question, must be taken to have been intended to stand by itself, and that it did not amount to a statement that cars were stopped at the place mentioned for the purpose of letting off passengers. *Ibid.*

16. At the argument in this court of an exception by the plaintiff to a ruling of the presiding judge directing a verdict for the defendant at the trial of an action against a street railway company to recover for personal injuries alleged to have been received by the plaintiff from his being thrown from a car of the defendant by its sudden starting as he was standing on the step about to alight, while the car was moving slowly, at a place which was not a regular stopping place for the defendant's cars, the plaintiff contended that he had been invited by the defendant to prepare to alight before he reached the regular stopping place, and that the defendant had waived the rule, implied from the establishing of stopping places, that passengers were to alight at stopping places only. The plaintiff had made no requests for rulings at the close of the evidence at the trial, and the presiding judge had directed a verdict for the defendant. The only evi-

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dence appearing in the bill of exceptions to support the contentions of the plaintiff in this court was testimony of the plaintiff "that he thought the car was coming to a stop on the [side of the street before the stopping place], and, if it was to let passengers off, he would get off there, the same as they do in hundreds of places at every hour of the day," and evidence that the plaintiff had arisen from his seat and proceeded to the step from which he was thrown because the car had lessened its speed just before reaching a point where the track was intersected by another track from a cross street. *Held*, that the bill of exceptions showed no error made by the trial judge, since it did not sufficiently appear from the bill that the plaintiff had tried his case upon the contention that the defendant had waived the rule as to stopping places, and, without such waiver, there was no evidence of the invitation upon which he relied. *Stevens* v. *Boston Elevated Railway*, 471.

Injury to person on highway.

17. In an action by a woman against a street railway company for personal injuries incurred, when being driven as a guest in an automobile, from being run into by a car of the defendant on a narrow bridge over a railroad, there was evidence on which it could be found that the plaintiff was inexperienced in regard to automobiles and that the driver, whose guest she was, was skilful and experienced in that regard, that the automobile was following behind a street car of the defendant which was moving very slowly on the bridge, that there was not room to pass this car on the right, that the driver turned to the left upon the parallel track to pass the car, that when the automobile got on the track its occupants saw another car of the defendant approaching at a high rate of speed from the opposite direction, that the driver brought the automobile to a full stop, but that the car in spite of the efforts of the motorman could not be stopped in time to avoid a collision, and struck the automobile with violence, causing the injuries sued for. *Held*, that the jury well might have found that the plaintiff took a wise course in not attempting to interfere with the driver's management of the automobile, that there was no relation of agency between her and the driver to affect her with negligence on his part and no mutuality in a common enterprise between them, so that the question of the plaintiff's due care was for the jury, and it was not necessary to consider whether the driver was negligent or not. *Chadbourne* v. *Springfield Street Railway*, 574.

18. In an action by a woman against a street railway company for personal injuries incurred, when being driven as a guest in an automobile, from being run into by a car of the defendant on a narrow bridge over a railroad, there was evidence on which it might have been found that the motorman of the car which ran into the automobile was driving it at the rate of about fifteen miles an hour to and upon the bridge, that the approaches to the bridge were at so sharp a grade that a car coming from either side could not be seen by the motorman of a car coming from the other side until both cars were substantially on the bridge, that the automobile had been following behind another car of the defendant which was moving

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very slowly, that there was not room on the narrow bridge for the automobile to pass the car on the right and there was room to pass it on the left only by travelling wholly or in part upon the parallel track of the defendant, that the driver turned to the left to pass the car, that after the defendant's approaching car and the automobile had become visible from each other, the automobile came to a full stop, but the car in spite of the proper effort then made by the motorman could not be brought to a standstill in time to avoid a collision, and struck the automobile with such force as to move it a considerable distance, causing the plaintiff's injuries. The bill of exceptions contained the following statement: "On the day of the accident there was in force a rule or order of the defendant, with which all its employees running over the bridge were familiar, that two double truck cars should not be on the bridge simultaneously. This rule was made pending the strengthening of the bridge, which was done after the date of the accident." Both of the defendant's cars on the bridge at the time of the accident were double truck cars. *Held*, that the statement that the rule of the defendant above quoted "was made pending the strengthening of the bridge, which was done after the date of the accident," did not overcome the express statement that it was in force at the time of the accident, nor show that it was so far intended merely to protect the defendant's passengers that its infraction could not be regarded as negligence toward others, and, if so, the mere fact of the violation of the rule was some evidence of negligence in running the car, but that, even in the absence of such an express rule, the jury might find that the defendant's cars should not be allowed to obstruct and endanger travellers in other vehicles by passing each other upon so narrow a bridge approached at so steep a grade, and that, in view of all the circumstances, the court could not say that the jury had not a right to find that it was negligent to take the car upon the bridge while another car was upon it at such a rate of speed as might make a collision with another vehicle unavoidable after knowledge of such a danger; consequently, that the question of the defendant's negligence was for the jury. *Chadbourne* v. *Springfield Street Railway*, 574.

Railroad.

Liability of railroad for injury caused by fire communicated from locomotive, see RAILROAD.

Liability to employee, see *ante*, 11.

In Use of Highway.

19. At the trial before a judge without a jury of an action of tort to recover for personal injuries alleged to have been received by the plaintiff, while walking upon a sidewalk on a public street in a city, by reason of a tongue on a dump cart owned by and in charge of an employee of the defendant either hitting the plaintiff or falling against a window and breaking glass which fell upon the plaintiff, there was evidence tending to show that the horses had been unhitched from the cart and that the tongue was left sticking up in the air, and it was admitted by the defendant, in answer to interrogatories by the plaintiff, that the cart was out of order and that the

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driver was trying to repair it and had asked a bystander to assist him, that the bystander "took hold of a blanket which was caught between the seat and the sweep of the cart and jerked it free, and, as he did so, the perch broke and the pole swung around over the sidewalk, and hit a window, breaking the glass." There was evidence that the plaintiff was hit either by the tongue or by the glass. The defendant introduced no evidence. The judge found for the plaintiff. *Held*, that the finding was warranted, both because it was within the scope of the driver's authority to procure the assistance of the bystander under the circumstances, and therefore what was done by the bystander was as if done by the driver; and also because the unexplained defective condition of the cart could have been found to have been a contributing cause of the accident. *Hollidge* v. *Duncan*, 121.

Action against street railway company by guest in automobile run into by street car, see *ante*, 17, 18.

Action by conductor of open electric car who, while on running board collecting fares, was struck by automobile in street, see *post*, 20–22.

Of one owning or controlling Real Estate.

Liability of landlord to tenant for injuries resulting from defects in the premises leased, see LANDLORD AND TENANT, 1–3.

Of owner of house maintaining water spouts which caused water to collect and freeze on sidewalk of public way, see NUISANCE, 1–4; MUNICIPAL CORPORATIONS, 2.

Action by tailor's boy against owner of students' dormitory for personal injuries received by plaintiff and due to sudden starting of elevator as he was entering it, see *post*, 23, 24.

Liability of owner of real estate occupied by tenant for injuries resulting to traveller upon sidewalk from defective condition of coal hole therein, which condition existed before the letting, see LANDLORD AND TENANT, 4–7.

Automobile.

20. In an action by a conductor of an open street railway car for personal injuries from a collision with an automobile delivery van owned and driven by the defendant, if it appears that when the collision occurred the plaintiff was on the running board of his car collecting fares from the passengers, and that the defendant's automobile was disabled and without motive power and had moved very slowly from a sidewalk towards the tracks of the street railway as the car on which the plaintiff was conductor was approaching, the question whether the plaintiff should have seen and guarded against the danger of a collision and should have exercised more supervision over the motorman or whether taking all the circumstances into account he was in the exercise of due care is for the jury. *Dudley* v. *Kingsbury*, 258.

21. In an action by a conductor of an open street car for personal injuries from a collision with an automobile delivery van owned and driven by the defendant, where it appeared that when the collision occurred the plaintiff was on the running board of his car collecting fares from the passengers, and that the defendant's automobile was disabled and without motive

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power and had moved very slowly from a sidewalk toward the tracks of the street railway as the car on which the plaintiff was a conductor was approaching, it was *held*, that, assuming in the defendant's favor that if negligence of the motorman caused or contributed to the collision the plaintiff could not recover, the questions whether on the facts shown by the evidence the motorman should have discovered the plight of the defendant's automobile before he did and whether he exercised proper care in the way in which he operated the car after he did discover it were for the jury. *Dudley* v. *Kingsbury*, 258.

22. In an action by a conductor of an open street railway car for personal injuries from a collision with an automobile delivery van owned and driven by the defendant, it appeared that the defendant had attempted to turn his automobile from one street into another with an up grade, that in doing so the wheel of the automobile dropped into a depression or gutter, which caused the driving chain to be thrown off from the rear sprocket, and left the automobile without motive power and incapable of control by the ordinary brake, that owing to the steepness of the street at that point the automobile started backward into and down the first street, that the defendant tried to stop it by turning it against the curbstone, but that its momentum carried it over the curbstone, across the sidewalk and against a terrace or bank, that it then recoiled from the bank and started forward very slowly across the sidewalk into the street and toward the street railway tracks as the car of which the plaintiff was conductor was approaching, and the collision occurred. The defendant testified that he tried to stop his automobile by using the emergency brake but that it would not work, because it was smeared with oil from the chain that had fallen on it when thrown off from the sprocket. There was testimony which, if believed, tended to show that the accident might have been avoided by the use of the emergency brake at the proper time. The plaintiff contended that the defendant was negligent in his manner of driving his automobile and particularly in not using the emergency brake. *Held*, that it was for the jury to give such weight as they saw fit to the defendant's testimony and his explanation of the failure of the emergency brake to work, and that it was also for them to say whether the defendant exercised due care in turning the corner as he did, and whether, if he was negligent in this, such negligence contributed to the accident, and generally that the question of the defendant's negligence was for the jury. *Ibid.*

Action against street railway company by guest in automobile run into by street car, see *ante*, 17, 18.

Elevator.

23. In an action by a tailor's boy against the owner of a building used as a students' dormitory, for personal injuries caused by the sudden starting of an elevator as the plaintiff was about to enter it from the fourth floor of the building, after he had delivered a suit of clothes at the room of a student and had returned to the elevator with both arms laden with clothes for other customers, before the elevator boy, who had left the doorway of the elevator open and then had gone to attend to the wants of a

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tenant, had returned, the declaration contained an allegation that the plaintiff "was injured by reason of the negligence of the defendant and her servants in managing, operating and controlling said passenger elevator." The janitor of the building was called as a witness and was asked by the plaintiff, "Were there instructions in reference to leaving the elevator?" The plaintiff's counsel stated that the plaintiff's contention was, that it was "a negligent way to control an elevator to go away and leave the gate open." The judge said, "It is not open on your pleadings to rely on that," and excluded the question. *Held*, that the exclusion was error; that the allegation of the declaration above quoted included negligence of the elevator boy in being absent from the elevator when his presence in it was required for properly managing, operating and controlling it, and that the plaintiff should have been allowed to prove the instructions given by the janitor to the elevator boy in regard to leaving the elevator. *Toohy* v. *McLean*, 466.

24. In an action by a tailor's boy against the owner of a building used as a students' dormitory, for personal injuries caused by the sudden starting of an elevator as the plaintiff was about to enter it from the fourth floor of the building, after he had delivered a suit of clothes at the room of a student and had returned to the elevator laden with clothes for other customers, there was evidence warranting findings that the elevator was a small one, its doorway being only two feet wide, that it was operated by water power and was controlled by means of a lever, which worked in a slot that was set with teeth to hold the lever where it was put, that the lever was released from the teeth by raising a clutch in its handle, that when the plaintiff had entered the elevator the elevator boy took him to the fourth floor, and went with him from the elevator to open the door of the room where the plaintiff was to deliver the suit of clothes, that the elevator boy then was called to the next room to take out an empty trunk and went there, that the elevator had been leaking, and the elevator boy had left the lever outside the teeth and a little forward of the centre of the slot, to offset the leakage, that this was the proper if not the necessary way to keep the elevator still while there was a leak, that an elevator of this kind when leaking and left in this way might appear to be perfectly still, that in such a case it would move very slowly and its movements would be perceived only after an interval of time, that the lever was at the left hand side of the doorway of the elevator as one entered it, that if the lever was pushed forward quickly to its full length the elevator would go up about three hundred feet in a minute, that when the plaintiff returned to the elevator the elevator boy was not there, that, seeing the doorway open and the elevator apparently at rest, he undertook to enter it, that, being encumbered by from six to nine pieces of clothing which he was carrying on both arms, he could not go straight through the two foot doorway into the elevator, and tried to get in by entering it sideways, that it was somewhat dark at the entrance of the elevator at the time, that the elevator appeared to be about four inches above the floor and to be still, that as the plaintiff attempted to enter it sideways he was, according to his own narration, "struck backward and pitched underneath" and into

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the elevator well, or as another witness testified, the elevator went down and then came up quickly and the plaintiff went out and down when it came up. *Held*, that there was evidence of negligence on the part of the defendant in operating a leaky elevator, in which it was necessary to leave the lever outside the teeth and forward of the centre of the slot to keep the elevator still, with the result that if the lever was pushed the full length forward or backward it would send the elevator up or down at the rate of three hundred feet a minute, that it might have been found that the elevator boy knew that the plaintiff was going back to the street by the elevator with his arms laden with clothes, and that knowing this he left the lever where it would be pushed backward or forward or both, if caught by the clothes on the plaintiff's arms as he was entering the narrow doorway, that the elevator boy left the doorway of the elevator open and went to the room where he was called to attend to the wants of the tenant, and stayed away so long that he knew or if he had exercised due care ought to have known, that the plaintiff would have returned to go down in the elevator, that the negligence of the elevator boy was in law the negligence of the defendant, and that these facts would constitute negligence, if the plaintiff might be expected to enter the elevator in the absence of the elevator boy, that such an act was reasonably to be expected, and therefore that the accident could be found to have been the probable consequence of the defendant's negligence. *Held*, *also*, that there was evidence that the plaintiff was in the exercise of due care, as he well might have thought that the elevator boy when he left the doorway open intended him to enter the elevator, and there was nothing to show that the plaintiff knew anything about the working of the lever or the way in which it had been left by the elevator boy, so that there was no evidence that he knew or ought to have known that there was any danger in entering the narrow elevator doorway with clothes on both arms. *Tooky* v. *McLean*, 466.

In a Factory or Machine Shop.

Action by employee against proprietor of workshop for injuries resulting from falling of trip hammer upon employee's fingers due to his foot striking pedal and starting machine, see *ante*, 10.

In Manufacturer's Freight Yard.

Freight brakeman on car of railroad company in freight yard of manufacturer crowded with merchandise is not relieved from duty of exercising care for his own protection by fact that duties as brakeman require him to turn his back toward direction in which car is going, see *ante*, 1.

Action against manufacturer for injuries to employee resulting in death caused by negligence of person in charge of locomotive engine of manufacturer used in yard, see *ante*, 5, 6.

In tearing down Old Building.

Action against employee by carpenter engaged to assist in tearing down building, he never before having done such work, for injuries resulting from his falling through roof, see *ante*, 9; EVIDENCE, 7, 8.

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Causing Death.

Action against manufacturer for injuries resulting in death caused to employee by negligence of person in charge of locomotive engine of employer used in manufacturer's yard, see *ante*, 5, 6.

Violation of By-law of Municipality as Evidence of Negligence.

See NUISANCE, 2.

Violation of Rule of Street Railway Company as Evidence of Negligence.

See *ante*, 18.

NET PROFITS.

The net profits of an enterprise consist of the clear gain of the venture after deducting from the net value of all assets on hand the capital invested in the business and all outstanding liabilities. *Thurston* v. *Hamblin*, 151.

Proper computation of net profits under certain contract between party who furnished capital for carrying on business and party who furnished time and skill, see CONTRACT, 13.

NEW TRIAL.

See PRACTICE, CIVIL, 13, 14.

NOTICE.

Of resulting trust, see TRUST, 5.

Notice of dissolution of partnership, given only to attorney at law, who is retained generally by customer of former firm but is not at time of notice acting in any matter on his behalf, is not notice to customer, see ATTORNEY AT LAW, 1, 2.

Question whether certain evidence warranted drawing of inference that notice was given to corporation in letter addressed to treasurer, and whether master before whom case was heard drew such inference, see EVIDENCE, 2; EQUITY PLEADING AND PRACTICE, 4.

Notice to employer under R. L. c. 106, § 75, alleging negligence of employer, includes not only personal negligence of employer but also negligence of his superintendent within scope of employment, and, in action brought after such notice, negligence of both may be relied on, see EMPLOYERS' LIABILITY ACT.

NUISANCE.

1. One in control of a house maintaining spouts which collect surface water from his roof and pour it upon the sidewalk of a public way in such a manner as to cause a nuisance in freezing weather, is liable for an injury thus caused if by the exercise of ordinary care he would have known that

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the storm water from his house in conjunction with a depression or gully in the sidewalk produced a dangerous condition. *Field* v. *Gowdy*, 568.

2. In an action against one in control of a house for personal injuries alleged to have been incurred while travelling on a public sidewalk by reason of a nuisance maintained by the defendant, where there is evidence warranting a finding that the defendant collected the surface water from his roof by spouts which poured it upon the sidewalk in such a manner as to create a nuisance by freezing in a ridge, it is proper to admit in evidence a by-law of the town in which the house is situated prohibiting the discharge of water upon a sidewalk from the eaves or leader pipes of any building, of which the acts of the defendant were a violation, such violation of the by-law being competent evidence to be considered with all the other circumstances as bearing upon the question of the maintenance of a nuisance by the defendant, although not conclusive upon that issue. *Ibid.*

3. In an action against one in control of a house for personal injuries alleged to have been incurred while travelling on a public sidewalk by reason of a nuisance maintained by the defendant, if there is evidence that from two spouts on the defendant's house, one about eleven feet from the street line and the other a number of feet nearer, water was conducted from the roof and turned upon a concrete walk of the defendant, from whence by reason of the natural grade of the walk it flowed to the sidewalk, where it froze in a ridge about three inches in thickness in the middle, this is sufficient to warrant a finding that the defendant collected the surface water in an artificial course and poured it upon the public way in such a manner as to create a nuisance. *Ibid.*

4. In an action against one in control of a house for personal injuries alleged to have been incurred while travelling on a public sidewalk by reason of a nuisance maintained by the defendant, if there is evidence warranting a finding that the defendant collected the surface water from his roof in an artificial course and poured it upon the sidewalk in such a manner as to create a nuisance by freezing in a ridge, it is no defense for him to show that there was a depression or gully in the sidewalk, into which the water from his spout flowed and froze, and that but for this defect in the sidewalk the water would have run off before it froze, as a landowner in turning water upon a public way is bound to take into account its actual condition and to determine at his peril whether his act in conjunction with the condition of the way will create a nuisance. *Ibid.*

Liability of owner of real estate occupied by tenant for injuries resulting to traveller upon sidewalk from defective condition of coal hole therein, which condition existed before the letting, see LANDLORD AND TENANT, 4–7.

OFFICER.

An officer making an arrest which he is authorized to make has a right to use such force as is reasonably necessary to overcome resistance, but if he uses unreasonable or excessive force he is liable in an action of tort for assault and battery, and in such an action, if it is shown that the force

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used by the defendant was excessive, it is no defense that he acted without malice and in the honest belief that the force which he used was necessary. *Powers* v. *Sturtevant*, 265.

OVERSEERS OF THE POOR.

1. The overseers of the poor of a town were given power, under St. 1793, c. 59, § 14, to prosecute in the name of the town certain actions described "in the preceding sections of this chapter." Like phraseology was used in the codifications of the law in Rev. Sts. c. 46, § 26, and Gen. Sts. c. 70, § 22, but in the revisions in Pub. Sts. c. 84, § 33, and R. L. c. 81, § 38, the words "of this chapter" were omitted, and among the "preceding sections" was Pub. Sts. c. 84, § 25, R. L. c. 81, § 29, providing for criminal prosecutions against the overseers themselves. *Held*, that it did not appear that by the last two revisions any lessening of the powers of the overseers to bring the actions specified in the chapters named was intended by the Legislature. *Great Barrington* v. *Gibbons*, 527.
2. Under R. L. c. 81, § 38, the overseers of the poor of a town have power to bring in behalf of the town a bill in equity under § 11 of that chapter to compel a grandfather who has sufficient ability to contribute toward the support of his grandchildren who are paupers and are being supported by the town. *Ibid.*
3. The word "prosecute," as used in R. L. c. 81, § 38, directing that in certain actions and prosecutions "the overseers of the poor of any place . . . shall appear and prosecute . . . in behalf of such place," includes the bringing as well as the carrying on of such an action. *Ibid.*

PARK COMMISSIONERS.

Neither St. 1905, c. 366, § 1, nor St. 1906, c. 412, § 1, affects power, theretofore existing, of park commissioners to make rules as to use of automobiles in parks and parkways, see AUTOMOBILE.

PARTNERSHIP.

1. Statement by KNOWLTON, C. J., of the effect of the sale of the good will of a partnership under a decree of court where the affairs of the partnership are wound up by reason of the death or bankruptcy of one or all the partners as distinguished from the effect of a voluntary sale of an interest in a business including the good will, the character of the good will for which the defendants in the present case were liable to account to the plaintiff being the same as if they had acquired it at a sale under a judicial decree. *Moore* v. *Rawson*, 498.
2. R. L. c. 72, § 5, providing that "a person who carries on business in this Commonwealth shall not assume or continue to use in his business the name of a person formerly connected with him in partnership or the name of any other person, either alone or in connection with his own or any other name or designation, without the consent in writing of such

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person or of his legal representatives," does not interfere with the right of a purchaser of the good will of a partnership sold under a judicial decree to advertise as the successor to the former firm. *Moore* v. *Rawson*, 493.

3. A purchaser, at a sale under a judicial decree, of the assets of a partnership, including a list of customers of the firm, and of the good will of the business, acquires the right to use the list as a means of increasing his business, and the partners of the old firm, although they may establish a competing business, have no right to compel the purchaser to furnish them a list of the customers of the old firm or to submit such a list for their examination. *Ibid.*

4. The purchaser of the good will of a partnership sold under a judicial decree acquires the right to use the firm name for the purpose of designating the business carried on by him as a continuation of that done by the old firm, but the exercise of this right is subject to the limitations necessary to protect the rights of the former partners of the old firm, such as that expressed in R. L. c. 72, § 5, and the purchaser has no right to use the name of the old firm in such a way as to indicate that the business is being conducted at that time by persons who have no connection with it. Each member of the old firm has the right to use his own name in a new business, either alone or with the names of others who are associated with him, but only the purchaser lawfully can use the firm name as an indication that his business is a continuation of that of the old firm. *Ibid.*

Application of foregoing principles in suit in equity by one who, by compulsory dissolution of partnership of which he was member, had been forced to retire, against former partners for accounting, see EQUITY JURISDICTION, 6–8.

Proper computation of net profits under certain contract between party who furnished capital for carrying on business and party who furnished skill and time, see CONTRACT, 13.

Notice of dissolution of partnership, given only to attorney at law who is retained generally by customer of former firm, but is not at time of notice acting in any matter on his behalf, is not notice to customer, see ATTORNEY AT LAW, 1, 2.

PASSENGER.

Rights of passenger under contract limiting liability of carrier, see CARRIER, 1–3.

Passenger cannot transport pedler's pack as personal baggage, see CARRIER, 4.

Person held not to be passenger on electric street car which was proceeding to car barn after discharging passengers at end of trip, see STREET RAILWAY, 7.

PATENT.

Jurisdiction of State court with regard to construction and enforcement of instrument transferring rights under letters patent, see EQUITY JURISDICTION, 8.

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PAUPER.

Suit in equity under R. L. c. 81, § 38, to compel grandfather of pauper children to contribute to their support, see OVERSEERS OF THE POOR, 1–3.

PAYMENT.

Action on policy of accident insurance, evidence introduced at trial of which warranted jury in finding that no payment of indemnity under policy had been made, see INSURANCE, 5.

Case involving question whether certain transactions of trustee were intended to be assignment of mortgage, which would have been outside his powers, or receipt of payment of note and discharge of mortgage, which were within his powers, see MORTGAGE.

PERSONAL PROPERTY.

Whether, as between mortgagor and mortgagee, certain articles were affixed to a house so as to have become real property, see FIXTURES, 1, 2.

PHYSICIANS AND SURGEONS.

1. R. L. c. 76, § 8, imposing a penalty for the unauthorized practice of medicine by persons not properly registered in accordance with the statute, is constitutional. *Commonwealth* v. *Jewelle*, 558.

2. At the trial of one charged under R. L. c. 76, § 8, with practising medicine although not lawfully authorized or registered so to do, there was evidence tending to show that the defendant, who did not contend that he had any knowledge of drugs or of disease in the ordinary sense, at times made diagnoses of his patients, and prescribed medicines for them. *Held*, that there was evidence warranting a conviction. *Ibid.*

3. One, who is not lawfully authorized and registered to practise medicine within this Commonwealth, may "practise medicine" and thus violate the provisions of R. L. c. 76, § 8, which impose a penalty in case a person so unauthorized and unregistered practises medicine, although he assumes to practise as a member of one of the schools, members of which by § 9 are excepted from the provisions of § 8 "if they do not violate any of the provisions" of that section, and although he does not prescribe or deal out a substance to be used as a medicine. *Ibid.*

What is included in science of medicine, see MEDICINE.

Lien of attorney at law on money recovered for his client for amount sufficient to settle physicians' bills against client lost by failure to have physicians summoned into court to enable him to establish amount of lien, see EQUITY JURISDICTION, 21.

PITTSFIELD.

1. St. 1892, c. 185, by which an additional water supply for the city of Pittsfield was authorized, provided that it should not take effect "until

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accepted by a two-thirds vote of all the members of each branch of the city council of said city, taken by yeas and nays and approved by its mayor." In an action, in which it was material to show that this statute was accepted by the city, the records of the board of aldermen and of the common council showed that the statute was "adopted . . . by a two-thirds aye vote." *Held*, that the language of such a record of a legislative body is to be construed favorably to the validity of the action if it is fairly susceptible of such a construction, and accordingly that, although the records here were not so explicit as they ought to have been, they would be interpreted to mean that the act was accepted in accordance with its terms. *Bryant* v. *Pittsfield*, 530.

2. Under St. 1892, c. 185, authorizing an additional water supply for the city of Pittsfield, which is silent as to the manner of taking the waters named, and contains no requirement in terms that any certificate or other writing should be filed in the registry of deeds, and, after making provision for taking the waters of certain brooks for a water supply, authorizes the city "for this purpose to take, by purchase or otherwise, any lands on or around any of said brooks, and any water and water rights connected therewith," the taking by the city of a deed of land on one of the brooks named in the statute, with the right to lay a pipe and construct an aqueduct, the erection of a dam across the brook and the construction of a reservoir there, the diversion of the water of the brook into a ten inch main and conducting it for use by the inhabitants of the city, all these things being done professedly under the authority of the statute, constitute a taking of the water of the brook within the meaning of the statute. *Ibid.*

PLACING ON FILE.

See PRACTICE, CRIMINAL, 8.

PLEADING, CIVIL.

Declaration.

1. In a civil case where the defendant's knowledge of specific facts is essential to the plaintiff's right of action, an averment in the declaration that the act complained of was done "maliciously" does not include an averment of the defendant's knowledge of such facts. *McGurk* v. *Cronenwett*, 457.

Rule requiring that in actions of tort for libel or slander allegations that defendant by false and malicious statements induced third person to discharge plaintiff from his employ or to refuse to employ him must set out statements alleged to be false and malicious, is not to be extended to action of tort for maliciously inducing third person to break contract with plaintiff, see UNLAWFUL INTERFERENCE, 1.

Various other requirements in declaration in such case, see UNLAWFUL INTERFERENCE, 2–6.

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Petition for Damages from Abolition of Grade Crossing.

Demurrer to petition for damages resulting to landowner because of interference with light, air and prospect due to abolition of grade crossing sustained because petition contained no allegation that in course of abolition any land or easement in land was taken or any private way was changed or discontinued, see DAMAGES, 3; but result would have been different had such allegation been made, see *ibid.* 4.

Remedy for recovery of damages resulting to owner of land from temporary use of land in course of abolition of grade crossing near by is by action of tort and not by petition under St. 1906, c. 463, Part I. § 37, see DAMAGES, 7.

Plea in Abatement.

Question whether action of contract properly was brought against one in capacity of assignee for benefit of creditors of third person instead of against him individually should be raised by plea in abatement or demurrer and not at trial of case, see PRACTICE, CIVIL, 1.

Demurrer.

Question whether action of contract properly was brought against one in capacity of assignee for benefit of creditors of third person instead of against him individually should be raised by demurrer or plea in abatement and not at trial of case, see PRACTICE, CIVIL, 1.

Answer.

2. A defense which affects only the remedy, such as a statute of limitation, must be pleaded as a matter of avoidance, and is waived by an answer containing only a general denial. *McRae* v. *New York, New Haven, & Hartford Railroad*, 418.

3. Under our practice act a general denial puts in issue all facts which the plaintiff must prove to establish his right to recover, whether such facts are alleged in the declaration or not. *Ibid.*

4. The provision of R. L. c. 106, § 75, that an action under the employers' liability act must be brought within one year after the accident which causes the injury or death, is not a mere statute of limitation, but states a condition precedent to a right of action under the act, and accordingly the defense that such an action was brought more than a year after the accident is open to a defendant whose answer contains only a general denial. *Ibid.*

PLEADING, CRIMINAL.

Indictment.

Under R. L. c. 218, § 67, setting forth sufficient forms of indictment, an indictment charging, that the defendant on a certain day "with intent to injure and defraud did utter and publish as true a certain forged instrument purporting to be a promissory note well knowing the same to be forged," sufficiently informs the defendant of the nature of the offense with which he is charged. If he needs further particulars to enable him to prepare his defense, R. L. c. 218, § 39, gives him a right to them. *Commonwealth* v. *Bailey*, 588.

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POLICE COURT.

See DISTRICT, POLICE AND MUNICIPAL COURTS.

POSSESSION OF BURGLARIOUS IMPLEMENTS.

1. At the trial of six defendants under R. L. c. 208, § 41, for having in their possession burglarious implements intending to use them as such, the government may put in evidence begging cards found in a tenement which the jury could find to have been the home of the defendants, as having a slight tendency to show the apparent occupation of the defendants or some of them, and as having a relation to the preliminary preparations for burglary. *Commonwealth* v. *Johnson*, 55.
2. At the trial of six defendants on an indictment under R. L. c. 208, § 41, for having in their possession burglarious implements intending to use them as such, a chief inspector of police was permitted to testify that a chisel and certain bags of cartridges, which were found in the tenement where the defendants lived, were such as ordinarily were used by burglars and such as were found upon or with them. *Ibid.*
3. At the trial of six defendants on an indictment under R. L. c. 208, § 41, for having in their possession burglarious implements intending to use them as such, it was admitted that several of them lived in a tenement where all of them were found together with their coats off, and where also were found implements capable of being used for committing burglaries and many loaded firearms. There was evidence in regard to the appearance of all of them from which the jury might infer that they were at home when the police officers found them. *Held*, that upon these facts and other circumstances which appeared in evidence the judge rightly refused to order a verdict of not guilty for the several defendants. *Ibid.*
4. At the trial of six defendants on an indictment under R. L. c. 208, § 41, for having in their possession burglarious implements intending to use them as such, where it appears that the defendants were found together in a tenement, which there was evidence was the home of all of them, and where also were found implements commonly used for committing burglaries and many loaded firearms, if the defendants fail to call any witnesses to testify in regard to their occupations and residences, their failure to do so is a circumstance proper for the consideration of the jury. *Ibid.*
5. At the trial of six defendants on an indictment under R. L. c. 208, § 41, for having in their possession burglarious implements intending to use them as such, a police inspector testified that during his conversation with one of the defendants a photograph of that defendant was shown, and the photograph then was exhibited to the jury. The photograph had been taken from the Rogues' Gallery and had written upon its back the police history of this defendant. The defendants excepted generally to the admission of the photograph in evidence, but made no objection on account of what was written on the back of it, and the attention of the judge was not called to this. It did not appear that the jury saw what was on the back of the photograph. *Held*, that the photograph was admissible on the question

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of the identity of the defendant whose photograph it was, and, although the writing on the back of the photograph rendered it incompetent to pass into the hands of the jury, and it should have been withheld from them if attention had been called to the matter, yet, in the absence of an exception on this ground, the verdict could not be set aside on this account. *Commonwealth* v. *Johnson*, 55.

6. At the trial of six defendants on an indictment under R. L. c. 208, § 41, for having in their possession burglarious implements intending to use them as such, it was shown that after the defendants had been arrested and had been removed to the station house an envelope addressed to one of the defendants was brought by a messenger to the tenement where the defendants lived and there was received and opened by the wife of the defendant to whom it was addressed, and that, on that defendant coming in, a telegram contained in the envelope was handed to him by his wife, that this defendant declared that he did not know anything about it, that thereupon the telegram was read to him by a police officer, whereupon this defendant shook his head. There was evidence that the telegram was lost, and the presiding judge allowed the police officer who read it to the defendant and another who heard it read to testify to its contents. The defendants did not object to the admission of the contents of the telegram on general grounds, nor as inadmissible against the defendants other than the one to whom it was addressed, but excepted to its admission solely on the ground that the defendant to whom the telegram was addressed said that he did not know anything about it. *Held*, that this objection was untenable, as the denial of knowledge by a defendant does not make evidence against him inadmissible, and that, the paper being lost, secondary evidence of its contents was admitted properly. *Ibid.*

7. At the trial of six defendants on an indictment under R. L. c. 208, § 41, for having in their possession burglarious implements intending to use them as such, a sergeant of police may be permitted to testify, after being cautioned to confine his testimony to particular instances, that a hall, near the house in which the defendants were living and in which the burglarious implements were found, had been broken into and a safe there blown open about three weeks before, if the presiding judge rules that he will admit the evidence *de bene* and will rule upon its competency later, as this evidence, if sufficiently connected with the defendants, would tend to show the intent with which they had the implements in their possession, although incidentally its effect would be to show the commission of another crime. *Ibid.*

8. At the trial of six defendants on an indictment under R. L. c. 208, § 41, for having in their possession burglarious implements intending to use them as such, if among the things found in the tenement where the defendants lived were a chisel and a fuse, which in themselves are lawful implements, *it seems* that it is within the discretion of the presiding judge to allow a witness against the defendants' objection to testify that within five minutes' walk from the house in which the defendants lived a certain hall was broken open and a window was forced, and to explain how chisels were used in effecting an entrance to the building and in opening the cash

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drawer, and that soap was put on the edges of the safe door, another witness having testified without objection that one of the ways of blowing open safes common with burglars is to pour nitro-glycerine into the crack around the door by means of a cup of soap, and to cause it to explode by a fuse, this evidence being regarded as in the nature of the narration of an experiment observed as to its effects by the witness, the admission of which is within the discretion of a presiding judge. *Commonwealth* v. *Johnson*, 55.

PRACTICE, CIVIL.

Parties.

1. An objection that an action of contract upon an agreement in writing improperly is brought against one "as assignee of" another "for the benefit of creditors" instead of against the defendant individually, the declaration showing that the agreement was made by the defendant in his individual capacity, should be taken by plea in abatement or by demurrer, and cannot effectually be raised at a trial of the action. *Mayberry* v. *Sprague*, 301.

Amendment.

2. A declaration in an action for personal injuries against an employer, brought within one year after the accident which caused the injuries, containing a count at common law alleging a failure to provide the plaintiff with a reasonably safe place in which to work and a count under the employers' liability act alleging a defect in the ways, works or machinery of the defendant, properly may be amended by the addition of a count alleging negligence of the defendant's superintendent as the cause of the same accident, and it does not matter that the amendment is offered and allowed more than a year after the accident, the new count being simply a statement of another ground on which the same cause of action is presented. *Berube* v. *Horton*, 421.

Particulars.

3. *It seems*, that determination of the questions whether a plaintiff in an action of tort should or should not be ordered to furnish further particulars than those set out in his declaration, and whether, after he has furnished further particulars, he has furnished all that he should, is wholly within the discretion of the judge before whom the questions are raised, and his rulings thereon are not subject to exception. *Hines* v. *Stanley G. I. Electric Manuf. Co.* 522.

Auditor.

Auditor in assessing damages for breach of contract is not bound to accept testimony of expert because it is the only evidence on subject, but is not justified in refusing to award any damages merely because he considers estimate of expert "obviously absurd," see DAMAGES, 9.

Auditor's Report.

4. An appeal from an order denying a motion of one of the parties to an action of contract "to discharge" a report of an auditor to whom the

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case had been referred without any agreement that the auditor's findings of fact should be final, will not be sustained, where it does not appear that the judge who heard the motion found that allegations of fact upon which the party making the motion relied were true, but it does appear that the motion was directed solely to the discretion of the court. *Hunneman* v. *Phelps*, 15.

5. In an action of contract which has been referred to an auditor who has filed a report, if one of the parties, without having moved to recommit the report to the auditor, or to have portions of it stricken out, has moved "to discharge the report" on the grounds that the hearings before the auditor were conducted in a manner unfair to him, and that some of the findings of the auditor were prejudicial to him and not germane to the issue referred to the auditor, and the motion has been denied, and if the report is offered in evidence at the trial of the case, it is the duty of the presiding judge to admit it. *Ibid.*

In action of contract by attorney for value of professional services rendered defendant, testimony of attorney who had dealings with defendant after rendering of services by plaintiff, held to be inadmissible to rebut statement in auditor's report as to defendant's "inability to speak the truth on any topic, even to her own counsel," see EVIDENCE, 21.

Discretion of Court.

It is within discretion of presiding judge to submit proper special questions to jury, see *post*, 11.

Order in which evidence shall be admitted at trial is matter within discretion of presiding judge, see *post*, 6.

Proper exercise of discretion by judge presiding at trial in exclusion of photograph of experiment, see EVIDENCE, 20.

Allowance of motion for new trial on ground that verdict is against evidence and weight of evidence is discretionary with presiding judge and not subject to exception, see *post*, 14.

Motion "to discharge" auditor's report held to be directed to discretion of judge, and refusal to grant it not subject to exception, see *ante*, 4.

Denial or granting of motion for bill of particulars is matter within discretion of court, see *ante*, 3.

Conduct of Trial.

6. The order in which the evidence at a trial shall be admitted is within the discretion of the presiding judge and a ruling in regard to it is not the subject of exception. *Boisvert* v. *Ward*, 594.

Verdict by direction, see *post*, 9, 10.

Submission of proper special questions to jury is matter within discretion of presiding judge, see *post*, 11.

Exception to judge's charge sustained because it was erroneous in seeming to urge importance of agreement among jurors by compromise of their honest opinions, and in failing to make sufficiently prominent idea that verdict should be conscientious verdict of each juror, see *post*, 7.

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Certain rulings and refusals to rule by judge presiding at trial of action for damages for breach of contract in writing for delivery of coal held correct, see *post*, 8; CONTRACT, 26.

Instructions by judge presiding at trial of action by contractor for breach of building contract, regarding measure of damages to be allowed owner for breaches of contract by contractor held correct, see CONTRACT, 18.

Proper exercise of discretion by judge in exclusion of photograph of experiment, see EVIDENCE, 20.

Judge presiding at trial must admit in evidence auditor's report as to which no motion to recommit or to strike out portions has been made before trial, especially where motion "to discharge" report has been denied, see *ante*, 5.

Judge's Charge.

7. The trial of an action of tort against a railroad corporation to recover for damages alleged to have been sustained by reason of a building of the plaintiff having been set fire to by a spark communicated from a locomotive engine of the defendant lasted a week, and was given to the jury at 2.30 P. M. on a certain day. The jury remained in continuous session until 10.30 the next morning, when they returned into court and requested further instructions from the judge on points of law. The judge, after stating to them the importance to the litigants of their reaching a verdict, continued: "I need not say to you, as has been said in other cases, that you can decide it as well as anybody else can; of course you can. . . . To say that you cannot decide this case is to say that another jury of twelve men cannot do it; and justice will be defeated in the end if that is so, as you understand. Therefore it is almost a necessity that you should come to some reasonable conclusion upon this case. And of course, in coming to that conclusion, it is a give and take argument that you make, necessarily. You are not to report to me, when you come in here, twelve individual verdicts. You are to give a verdict which, on the principle of give and take, represents the consensus verdict of you as a unit, as a body of men. Supposing you were sitting together as a board of directors in a corporation, and should fight over your policy. . . . In some way, you have to adjust your differences; you have to come to some conclusion in the end which will permit the business to go on. Now you can do that just as well here, and a good deal better, as representing somebody's else business, than you could if it were your own business, because your pocketbook is not interested. . . . We do not care anything about individuals or individual pocketbooks or individual interests. But we are absolutely desirous that so far as our minds go we shall be mentally honest, and we are absolutely desirous that right shall come out of these hearings, absolute right, so far as we can see it." *Held*, that the charge was erroneous in seeming to urge the importance of an agreement among the jurors by a compromise of their honest individual opinions, and in failing to make sufficiently prominent the idea that the verdict should be the conscientious verdict of each juror. *Highland Foundry Co.* v. *New York, New Haven, & Hartford Railroad*, 403.

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Rulings and Instructions.

8. In an action by a coal dealer against the owner of mines of bituminous coal for the alleged breach of a contract in writing for the sale and shipment of a certain amount of coal in each month during a period named, it appeared that there were printed at the head of the paper on which the contract was written the words "Sales subject to strikes, accident or causes beyond our control." In the body of the contract were the words "in case of strikes at the mines then such portion as should have been shipped during that period is to be cancelled." During the period in which the deliveries were required there was a strike in anthracite coal mines which seriously affected the coal business in regard to bituminous as well as to anthracite coal. The judge ruled that the words "Sales subject to strikes, accident or causes beyond our control" at the head of the paper formed a part of the contract, and added "but the word 'strikes' means strikes at the defendant's mines." The judge refused a request of the defendant to rule that "Upon the evidence at the time of making the contract there was an established custom in the coal trade in Pennsylvania that all sales were subject to strikes, accident, and causes beyond the control of the seller." The judge, however, did rule that "Upon the evidence the delivery of coal by the defendant under its contract was subject to strikes, accident, and causes beyond its control," although he found as a fact that the defendant did not bring itself within the terms of the request. *Held*, that the ruling last quoted and the finding of fact by the judge, made it unnecessary to pass upon the judge's ruling that the word "strikes," in the sentence at the head of the paper meant strikes at the defendant's mines or upon his refusal to make the ruling requested in regard to the existence of the alleged custom, as the defendant could not have been aggrieved by this ruling and refusal to rule whether they were correct or not. *Garfield & Proctor Coal Co.* v. *Pennsylvania Coal & Coke Co.* 22.

Other rulings regarding effect of "strike" clause, see CONTRACT, 26.

Instructions regarding measure of damages for breach of building contract held to be correct, see CONTRACT, 20.

Verdict.

Application of principle that verdict of jury must be conscientious verdict of each juror to case where instructions of judge were held not sufficiently to have emphasized it, see *ante*, 7.

Verdict by Direction.

9. Where on motion of the defendant in an action the presiding judge has ordered a verdict for him, and the plaintiff has excepted, upon the argument of the exceptions the ruling of the judge may be sustained upon a ground which was not taken by the defendant at the trial in his argument of his motion to order the verdict. *Mears* v. *Smith*, 319.

10. If the claim of the plaintiff in an action of contract is founded solely on an oral agreement between him and the defendant, which has been put in

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evidence but on which the plaintiff has no right to rely because it varies the terms of a contemporaneous contract in writing between them, which also is in evidence, the question of the plaintiff's right to recover properly may be raised by a motion that a verdict be ordered for the defendant, and such a motion must be granted. *Mears* v. *Smith*, 319.

Issues to Jury.

11. It is within the discretion of a presiding judge to submit proper special questions to the jury. *Hill* v. *Hayes*, 411.

Findings by Trial Judge.

12. The findings of fact made by a trial judge sitting without a jury are not open to revision if there is evidence on which they could have been made. *earse* v. *McLean*, 242.

New Trial.

13. An exception to a ruling of the judge who presided at a trial, denying a motion for a new trial based on the grounds that the verdict was against the evidence and the weight of evidence, and that the excepting party after the verdict had discovered new evidence, will not be sustained where it appears that there was evidence which warranted the verdict, and where the reasons of the judge for denying the motion are not shown, especially where it appears that the evidence alleged to be newly discovered was cumulative only. *Barnes* v. *Loomis*, 578.

14. An order of the judge who presided at a trial setting aside the verdict as against the evidence and the weight of evidence and granting a new trial is conclusive and is not the subject of exception. *Boyd, petitioner*, 262.

Memorandum made by judge in making such order is not properly part of record on petition to prove exceptions to ruling making order, see *post*, 15.

Memorandum of Judge.

15. If a judge, who presided at a trial and has made an order setting aside the verdict as against the evidence and the weight of evidence and granting a new trial, files a memorandum setting forth the grounds of his decision, such memorandum of the exercise of his discretion is not properly a part of the record, and there is nothing to prevent the judge from altering it, adding to it or even wholly withdrawing it at any time during the pendency of the proceedings before him, and he may make the alteration or addition in a certificate appended to a bill of exceptions which he disallows or in such other form as seems to him best, the matter being entirely within his discretion and control. *Boyd, petitioner*, 262.

Amicus Curiae.

16. While it is a general rule that, in the consideration of a suit based upon a statute, this court will not consider the constitutionality of the statute upon an objection made by persons whose rights are not affected by it, and usu-

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ally the parties to the suit are the only ones who are permitted to raise such a question, nevertheless, in a case where both the justification of the acts of the defendant and the power of the court to give the relief sought by the plaintiff depend entirely upon the validity of the statute, so that, both of the parties to the suit are precluded from raising the question of the constitutionality of the statute, and the attention of the court is brought to that question by persons who are interested in the effect to be given to the statute although not interested in the precise case before the court, it is the duty of this court to consider whether it has jurisdiction before it takes affirmative action. *New York Life Ins. Co.* v. *Hardison*, 190.

Appeal.

Appeal from ruling of judge denying motion "to discharge" report of auditor dismissed where it appeared that motion was directed to discretion of court and it did not appear that judge found to be true facts alleged and relied on by moving party, see *ante*, 4.

Exceptions.

17. The exclusion of a question to a witness is not the subject of exception if the next question put to the witness was in substance the same and was allowed to be answered. *Boisvert* v. *Ward*, 594.

18. An exception to the exclusion of a question to a witness cannot be sustained unless it appears by the bill of exceptions that the answer to the question would have been material and that the excepting party has suffered injury by its exclusion. *Ibid.*

19. A bill of exceptions, which sets forth exceptions taken at a trial to rulings of the presiding judge as to the admission and exclusion of evidence, must include all the facts which are necessary to enable this court to decide whether or not the rulings of which the excepting party complains are erroneous. *Barnes* v. *Loomis*, 578.

20. Where, by a bill of exceptions which contained an exception to a refusal by the judge presiding at a trial to allow a question to be put to a witness, it did not specifically appear what the answer expected by the excepting party was, nor that he expected that the answer would be favorable to him, nevertheless, if it does appear that the ruling was made irrespective of what the answer might be and upon the assumption that the answer would have been helpful to the excepting party, the exception must be sustained if the ruling was wrong. *Ross* v. *Shrieves*, 401.

Bill of exceptions held not to show that contention made by excepting party in this court was relied on by him at trial, see NEGLIGENCE, 16.

No exception lies to decision of judge upon motion for bill of particulars, see *ante*, 8.

Ruling of judge directing verdict for defendant may be sustained, on exception by plaintiff, on ground not taken by defendant at trial, see *ante*, 9.

No exception lies to order of judge who presided at trial setting aside verdict as against evidence and weight of evidence, see *ante*, 14.

Memorandum made in such case is not properly part of record on petition to prove exception to making of such order, see *ante*, 15.

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PRACTICE, CRIMINAL.

Motion to quash Indictment.

1. Where it appears by the bill of exceptions in a criminal case, that the defendant entered a plea of not guilty, and, before the empanelling of the jury, filed a motion to quash the indictment, if no objection appears to have been made to the filing of the motion after the defendant had pleaded to the indictment, the motion will be regarded as having been filed properly by leave of court. *Commonwealth* v. *Bailey*, 583.

Failure to produce Witnesses.

2. In a criminal case, although the failure of the defendant to testify in his own behalf cannot be used against him, inferences against him may be drawn from his failure to produce other witnesses. *Commonwealth* v. *Johnson*, 55.

Conduct of Trial.

3. If at a criminal trial the defendant allows certain evidence to go in without objection, and after it is in objects to it, his objection comes too late, unless the answers are not responsive to the questions, and, in that case, his remedy is to ask to have them stricken out as irresponsive. *Commonwealth* v. *Johnson*, 55.
4. In the trial of a criminal case it is the better practice for the presiding judge before exercising his discretion by admitting evidence temporarily, which may be made competent by other evidence introduced later, to require the prosecuting officer to state to him what he expects to prove and how he intends to connect it with the defendant, and to exclude such evidence as appears to be incompetent upon this statement. *Ibid.*
5. Where at a criminal trial the presiding judge, subject to the exception of the defendant, admits *de bene* evidence which will become relevant if connected with the defendant by other evidence, saying that he will rule upon its competency later, and the government fails to introduce the connecting evidence, if the defendant wants the evidence excluded, he must ask the judge to strike it out and to instruct the jury to disregard it, and, if he fails to do so, he cannot profit by his exception to the admission of the evidence at a time when it might have become competent. *Ibid.*
6. Where in a criminal case a witness for the government is narrating a conversation, the judge, in the absence of a request from the defendant to limit the narration to those parts of the conversation which are competent, in his discretion may allow the witness to finish his answer in order to determine intelligently what portions of it are admissible. When this is done, if the defendant wishes to except to the admission of any portions of the conversation, he must ask to have those parts stricken out. A general exception cannot be sustained if any part of the answer is admissible. *Ibid.*

Admission *de bene*, at trial of six defendants on indictment charging them with having in their possession burglarious implements intending to use

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them as such, of evidence of burglaries in neighborhood, as bearing on question of intent, see POSSESSION OF BURGLARIOUS IMPLEMENTS, 7.

Testimony held admissible in discretion of judge presiding at trial of six defendants on indictment charging them with having in their possession burglarious implements intending to use them as such, as being in nature of narration of experiment, see POSSESSION OF BURGLARIOUS IMPLEMENTS, 8.

Probation.

7. Although the provisions of R. L. c. 217, § 84, c. 220, § 2, in regard to putting persons charged with crime upon probation, do not say in terms that, if after a season of probation the object of the probation seems to be accomplished in such a way as not to require any punishment of the defendant, either for his own reformation or in the interests of the public, the court may dispose finally of the case by dismissing it, such a power is required for the exercise of the large discretion conferred upon the courts by the statute and is given by necessary implication. *Marks* v. *Wentworth*, 44.

Placing on File.

8. An indictment or complaint cannot lawfully be placed on file without the consent of the defendant, who has a right to have his case finally disposed of without unreasonable delay. *Marks* v. *Wentworth*, 44.

Exceptions.

9. Exceptions at the close of the charge of the judge presiding at the trial of a complaint against the defendant for the commission of a crime, which merely state that they are to the judge's "rulings and refusals to rule," do not give the excepting party the right to object to the charge as a whole, or to statements therein regarding matters to which he did not call the judge's attention. *Commonwealth* v. *Jewelle*, 558.

No exception to admission of evidence *de bene* will be sustained, even although evidence afterwards becomes incompetent, if no motion is made to strike it out, see *ante*, 5.

Where evidence is admitted without objection on part of defendant, he cannot afterwards except to its admission. If answers are not responsive to questions, he must move to strike them out, and, if motion is denied, except to such ruling, see *ante*, 3.

Where witness has been allowed by judge to finish narration of conversation with defendant in criminal trial, defendant, in order to except to admission of any portion of testimony, must first move to strike such portion out and then except, if motion is denied, see *ante*, 6.

PROBATE COURT.

Jurisdiction.

1. There is no jurisdiction in equity to "remould," reform or correct an instrument already admitted to probate as a will. *Polsey* v. *Newton*, 450.

2. A bill in equity in the Probate Court alleged that by the terms of a will

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certain personal property was placed in trust for the benefit of the testator's son N. and his wife, for life and, "upon the death of the survivor of them, my said son N. and his wife, to . . . transfer [said property] in equal shares to their three children," that the will had been proved, that, at the time the will was made, neither N. nor his wife had had children, but the testator had three grandchildren (two of whom were plaintiff's, the third having deceased), children of a daughter and of a son, and had intended to mention them in his will instead of three children of N. and his wife, and had given the scrivener who wrote the will such directions, but that the scrivener made an error, that at the time of the filing of the bill in equity N. and his wife both were living, fifty years old and childless. The defendants were the trustee, N. and his wife, and another son of the testator and such son's wife. The prayer of the bill was that the will be "remoulded and corrected in that the words 'their three children' be construed as and for the words 'my three grandchildren,' . . . and that the language . . . be made to conform to the facts." The defendants demurred. This court were unanimously of the opinion that the demurrer should be sustained on the ground that there is no jurisdiction in equity to "remould," reform or correct a will after it has been admitted to probate. A majority of the court were of the opinion that the demurrer also should be sustained on the additional ground that, upon the will being construed in the light of the facts alleged in the bill, it expressed without reformation the intention of the testator in accordance with the plaintiff's contention, LORING & BRALEY, JJ., dissenting. *Polsey* v. *Newton*, 450.

3. A petition which sought the appointment of a conservator of the property of one, who was alleged to be mentally weak and unable properly to care for his property, purported to be brought by a mayor and the overseers of the poor and one citizen of the city where the respondent lived, but contained no allegation that any of the petitioners were friends of the respondent. After the petition was filed, the Probate Court allowed it to be amended by adding after the petitioners' names the words "all of them being friends" of the respondent, and, after a hearing, granted the petition. *Held*, that the Probate Court had jurisdiction to allow the amendment and afterwards to grant the petition. *Delano* v. *Clark*, 540.

Appeal.

4. On the hearing before a single justice of an appeal to this court from a decree of the Probate Court dismissing a petition to have a conservator, who previously had been appointed to take charge of the petitioner's property because of the petitioner's mental weakness, removed and the property restored to the petitioner, the appeal was dismissed, and the petitioner appealed to the full court. The petition alleged and the answer denied that the petitioner had become able to take care of his property. The record before the full court contained no report of the evidence and no statement of the reasons why the single justice dismissed the appeal. *Held*, that there was nothing in the record to show that the appeal was not dismissed properly. *Delano* v. *Clark*, 540.

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PROBATION.

Under R. L. c. 217, § 84, c. 220, § 2, court has power to dismiss case against person charged with crime if, after season of probation, object of probation seems to have been accomplished, see PRACTICE, CRIMINAL, 7.

PROXIMATE CAUSE.

Negligence of bystander, whose assistance in repairing dump cart was procured by driver, held to be the same as negligence of driver so far as rendering driver's employer liable for injury resulting therefrom to traveller on highway, see NEGLIGENCE, 19.

PUBLIC OFFICER.

Suit in equity may be maintained to enjoin public officer from taking action injurious to plaintiff's rights of property under unconstitutional statute, see EQUITY JURISDICTION, 18.

Public officer cannot be enjoined by suit in equity from deciding wrongly questions committed to his decision by statute. Certiorari in some cases and mandamus in others are the proper remedies, see EQUITY JURISDICTION, 19.

PUBLIC SERVICE CORPORATION.

Gas company cannot refuse, under R. L. c. 58, §§ 16, 17, to supply gas to assignee for benefit of creditors of corporation because bill owed by corporation to gas company remains unpaid, but suit in equity is not proper remedy, there being a remedy at law by writ of mandamus, see GAS COMPANY, 1, 2.

RAILROAD.

Liability for Injury caused by Fire communicated from Locomotive.

At the trial of an action of tort against a railroad corporation to recover for damages alleged to have been sustained by reason of a building of the plaintiff having been set fire to by a spark communicated from a locomotive engine of the defendant, the plaintiff contended that such spark might have entered the building in any one of three ways, and the defendant requested that a verdict be directed for it, and excepted to a refusal of the presiding judge to grant the request. There was a verdict for the plaintiff. This court, without reviewing the evidence in detail, *held*, that there was evidence from which the jury were warranted in finding that a spark might have entered the plaintiff's building from the defendant's locomotive in either of two of the ways suggested by the plaintiff, and overruled the defendant's exception. *Highland Foundry Co.* v. *New York, New Haven, & Hartford Railroad*, 403.

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Baggage.

Rights of railroad company with regard to charging for transportation of pedler's pack, and lien of company on pack for transportation and storage charge, see CARRIER, 4.

Liability as Employer.

Action by engineer against railroad company to recover for injuries resulting from engine's leaving track due to defect in engine which made it dangerous to run it around curve at speed, see NEGLIGENCE, 11.

Liability as Carrier of Goods.

Suit in equity cannot be maintained by owner of certain goods against railroad company in whose possession goods were destroyed by lightning and against insurance company which had issued to railroad company policy "attaching upon property, interest and legal liability" of railroad company and including property of all kinds "for which insured may be legally liable," to have insurance of interest of railroad company applied for his benefit, see INSURANCE, 2.

REAL ESTATE.

Consideration of what articles are so attached to realty as to pass as part thereof on foreclosure of mortgage of realty, see FIXTURES, 1, 2.

Liability of owner or person in control of real estate for injuries resulting from his negligence, see LANDLORD AND TENANT, 1–3; NEGLIGENCE, 23, 24.

Liability of owner or person in control of real estate for injuries resulting from nuisance on the premises, see LANDLORD AND TENANT, 4–7; NUISANCE, 1–4; MUNICIPAL CORPORATIONS, 2.

Objection of owner of fee in public street forty feet wide in front of certain premises is objection of "owner of real estate within twenty-five feet" of premises, against which no license to sell intoxicating liquors to be drunk on such premises can be granted, see INTOXICATING LIQUORS.

RECEIVER.

Receiver of national bank cannot maintain action for contribution under U. S. Rev. Sts. §§ 5151, 5234, against one who was shareholder in bank at time when its period of succession was extended and who did not assent to the extension, and did all he could to have value of his shares appraised and paid to him under U. S. St. 1882, c. 290, § 5, see NATIONAL BANK.

RECORD.

Memorandum by judge part of record on appeal, see EQUITY PLEADING AND PRACTICE, 13.

But memorandum of decision which is exercise of discretion is not part of record, see PRACTICE, CIVIL, 15.

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REGISTRATION.

Of title to land, see LAND REGISTRATION.

RES JUDICATA.

Judgment of Land Court, on petition for registration of title of land which is bounded by private way bounding other lots also, fixing lines of way where it bounds on land whose title is registered, does not fix its lines as to other lots, see LAND REGISTRATION.

While appeal from decree for plaintiff in suit in equity was pending in this court, decree was ordered vacated to allow amendment by defendant setting up judgment of court of another jurisdiction rendered after such appeal and alleged by defendant to be bar to plaintiff's claim, see EQUITY PLEADING AND PRACTICE, 3.

RIPARIAN RIGHTS.

Rights of owner of tide mill privilege taken by Rockport for purposes of water supply, see WATERCOURSE, 3; DAMAGES, 5.

ROCKPORT.

Damages allowed for taking of water rights of owner of tide mill on Mill River for construction of waterworks for Rockport under St. 1894, c. 78, § 4, see WATERCOURSE, 3; DAMAGES, 5.

SALE.

Action to recover money paid by purchaser of land at invalid tax sale, see TAX, 8, 9.

Suit in equity by one who, by compulsory dissolution of partnership of which he was member, had been forced to retire, against former partners seeking accounting for property of partnership including its good will, rights of defendants in good will being held to be same as if they had acquired it by sale under judicial decree on dissolution by suit in equity, see PARTNERSHIP, 1–4; EQUITY JURISDICTION, 6–8.

Validity of sale by one New York corporation to another, formed on reorganization of former, of shares of capital stock of Massachusetts corporation having by-law requiring that they be offered to corporation through its treasurer before sale to outsider, see CORPORATION, 4.

SCHOOL.

At the hearing of a petition for a writ of mandamus commanding the town of Chilmark to provide a sufficient number of schoolhouses, properly furnished and conveniently located, for the accommodation of the peti-

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tioner's children, it appeared that at the time of the filing of the petition the petitioner lived with five children on the island of Noman's Land, a part of the respondent town, that there was no schoolhouse on Noman's Land, that the ages of the children were twenty-four, nineteen, seventeen, twelve and four years, that there were no other children on the island who would attend school, that the island was four miles distant from the island of Martha's Vineyard, where the main part of the respondent town was located and where it maintained a sufficient number of schools properly furnished and conveniently located. For some time previous to the filing of the petition, an arrangement had existed between the petitioner and the school committee, whereby the board and lodging of the petitioner's children of school age on the island of Martha's Vineyard and their transportation to and from there were paid by the town, but, upon the town refusing to pay such expense as to one of the children who became over fourteen years of age, the arrangement was abrogated by the petitioner, who thereupon filed this petition, contending that a school should be maintained on the island of Noman's Land. *Held*, that the contention could not be sustained and that the petition should be dismissed. *Davis* v. *Chilmark*, 112.

SEALER OF WEIGHTS AND MEASURES.

The act of a sealer of weights and measures in determining the correctness of a table of weights and values which is required to be arithmetically correct is ministerial in character. *Moneyweight Scale Co.* v. *McBride*, 503.

Constitutionality and construction of St. 1907, c. 535, regarding weights and measures and powers of sealer of weights and measures in testing them, see CONSTITUTIONAL LAW, 3, 4; WEIGHTS AND MEASURES, 1, 2.

SHIFTING USE.

Construction of deed creating a shifting use, see DEED.

SLANDER.

See LIBEL AND SLANDER.

SNOW AND ICE.

See LANDLORD AND TENANT, 3; NUISANCE, 1-4.

STATUTE.

Constitutionality.

Question raised by *amicus curiae*.

Instance where question of constitutionality of statute was allowed to be raised by person not party to suit but interested in effect to be given to

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statute, because both plaintiff and defendant were precluded from raising it, see PRACTICE, CIVIL, 16.

Of particular statutes.

Of St. 1905, c. 366, § 1, as amended by St. 1906, c. 412, § 9, regarding regulation of use of automobiles; and of St. 1907, c. 203, regarding same subject, see CONSTITUTIONAL LAW, 1, 2.

Of St. 1907, c. 535, concerning weights and measures see CONSTITUTIONAL LAW, 3, 4.

Of St. 1907, c. 576, § 75, concerning certain statutory requirements as to substance and form of life and endowment insurance policies, see INSURANCE, 6.

Acceptance.

Acts constituting acceptance by Pittsfield of St. 1892, c. 185, regarding its water supply, see PITTSFIELD, 1, 2.

Revision.

Where it does not otherwise appear that any change in the law was intended in the revision of a statute, mere verbal changes made in such revision do not alter the meaning of the statute. *Great Barrington* v. *Gibbons*, 527.

Extraterritorial Effect.

R. L. c. 74, § 7, making void certain contracts for sale of securities by others than owner or assignee, applies only to contracts made in this Commonwealth, see WAGERING CONTRACTS, 2.

And this also is true of R. L. c. 99, § 4, giving right to recover money paid on margins in certain cases, see WAGERING CONTRACTS, 1.

Construction.

After revision.

Verbal changes made in revision of statute do not alter its meaning in absence of evidence of intention of Legislature that they should, see *ante*.

Of particular statutes.

Where shareholder in national bank does not assent to extension of period of succession of bank and, under U. S. St. 1882, c. 290, § 5, does all he can to have his shares appraised and their value paid to him, but is prevented from so doing by officers of bank, he is not liable as shareholder under U. S. Rev. Sts. §§ 5151, 5234, see NATIONAL BANK.

Street railway corporation was not organized under Pub. Sts. c. 113, §§ 2-8 until location was procured under § 7 from authorities of cities and towns through which railway was to pass, see STREET RAILWAY, 1.

What constitutes acceptance of statute and taking of water of certain brook by Pittsfield for its water supply under St. 1892, c. 185, see PITTSFIELD, 1, 2.

Construction of §§ 13, 19 of charter of Boston Elevated Railway Company, St. 1894, c. 548, with regard to fund held by treasurer of Commonwealth and time when, on application by company to Supreme Judicial Court, he should return it to company, see BOSTON ELEVATED RAILWAY COMPANY.

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One, who at suggestion of tax collector of a city accepts from collector deed of land sold to another at tax sale and pays therefor, is "purchaser" within meaning of R. L. c. 13, § 44, and can maintain action for money paid in transaction, see TAX, 8; but not so if, before bringing action, he has quitclaimed his interest in land to another, see *ibid.* 9.

Consideration of proper remedies where assessment of tax for street watering purposes under R. L. c. 26, §§ 26, 27, is unwarranted or excessive, and where there are irregularities in such assessment, see TAX, 2–7.

Failure of town authorities to cause description and plan of land taken to widen public street to be filed in registry of deeds as directed by R. L. c. 48, § 97, within sixty days after vote accepting relocation does not affect validity of taking of land or of widening of street, see WAY.

Under R. L. c. 58, §§ 16, 17, gas company cannot refuse to supply gas to assignee for benefit of creditors of corporation on ground that bill owed by corporation to gas company remains unpaid, see GAS COMPANY, 1.

R. L. c. 72, § 5, does not interfere with right of purchaser of good will of partnership sold under judicial decree to advertise as successor of former firm, see PARTNERSHIP, 2.

What is practising medicine within the terms of R. L. c. 76, §§ 8, 9, forbidding it, except in certain instances, by persons not duly registered and authorized, see PHYSICIANS AND SURGEONS, 1–3.

Powers of overseers of poor under R. L. c. 81, § 38, to prosecute in name of town bill in equity to compel grandfather to contribute toward support of pauper grandchildren, see OVERSEERS OF THE POOR, 1–3.

Wagering contracts made outside Commonwealth are not referred to by R. L. c. 99, § 4, giving right to recover margins advanced on certain wagering contracts, see WAGERING CONTRACTS, 1.

Under R. L. c. 100, § 15, objection of owner of fee in public street in front of premises will prevent issuance of license to sell intoxicating liquors to be drunk on such premises, see INTOXICATING LIQUORS.

Manufacturing corporation using locomotive in its yard is liable to its employees under R. L. c. 106, § 71, cl. 3, for injuries resulting to them from negligence of person in charge thereof, see NEGLIGENCE, 5, 6.

Persons who, until corporation is organized, under R. L. c. 109, § 13, hold franchise or privileges of corporation by special act, see CORPORATION, 1.

Time when corporation incorporated by special act becomes organized and comes into possession of its franchise, displacing the incorporators and subscribers to stock, who until organization held franchise under R. L. c. 109, § 13, see CORPORATION, 2, 3.

Board of gas and electric light commissioners is not given power to require impairment of capital by corporation to be made good under R. L. c. 109, § 26, except as it makes such requirement condition under which new stocks or bonds may be issued, see GAS AND ELECTRIC LIGHT COMMISSIONERS.

Under R. L. c. 149, § 35, action against sureties on bond of guardian of insane person must be brought within four years after discharge of guardian, death being a discharge within terms of statute; R. L. c. 202, § 7,

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does not make continued insanity of ward stop period of limitation from running, see LIMITATIONS, STATUTE OF, 1–3.

Consent of owner of land or of any person having authority from or rightfully acting for him, which is required for establishment of mechanic's lien under R. L. c. 197, § 1, is consent to performance of work or furnishing of materials, not to creation of debt for them, see MECHANIC'S LIEN, 2, 3.

Under R. L. c. 217, § 84, c. 220, § 2, court has power to dismiss case against person charged with crime if, after season of probation, object of probation seems to have been accomplished, see PRACTICE, CRIMINAL, 7.

Neither St. 1905, c. 366, § 1, nor St. 1906, c. 412, § 1, affects power, theretofore existing, of park commissioners to make rules as to use of automobiles in parks and parkways, see AUTOMOBILE.

Constitutionality of St. 1905, c. 366, § 1, as amended by St. 1906, c. 412, § 9, and of St. 1907, c. 203, with regard to powers of boards of aldermen in cities and of selectmen in towns regulating use of streets and roads by automobiles, see CONSTITUTIONAL LAW, 1, 2.

St. 1906, c. 463, Part III. § 76, applies to wrongful discontinuances of use of track by street railways occurring before passage of statute, see STREET RAILWAY, 5; for instance where, on facts, relief under statute was denied, see *ibid.* 6.

Computation of excise tax which under St. 1907, c. 500, § 10, the Boston Elevated Railway Company is required to pay, see TAX, 1.

Constitutionality and construction of St. 1907, c. 535, regarding weights and measures and powers of sealer of weights and measures in testing them, see CONSTITUTIONAL LAW, 3, 4; WEIGHTS AND MEASURES, 1, 2.

St. 1907, c. 576, § 75, concerning statutory requirements as to substance and form of policies of life and endowment insurance and the duties and powers of insurance commissioner and remedies of insurance companies with regard thereto, see INSURANCE, 6-17.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES CITED AND EXPOUNDED.

See page 745.

STREET RAILWAY.

Organization of Corporation.

1. A street railway corporation was not organized under Pub. Sts. c. 113, §§ 2–8, until, under § 7, the locations for its tracks had been procured from the aldermen of the cities and the selectmen of the towns through

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which the railway was to pass, "under such restrictions as they" deemed "the interests of the public" might "require." *Selectmen of Clinton* v. *Worcester Consolidated Street Railway*, 279.

Judicial notice taken of fact that corporation organized since 1864 to own and operate street railway in this Commonwealth must have been organized under laws of this Commonwealth and not under special charter, see EVIDENCE, 1.

Condition in Grant of Location.

2. A street railway company, which petitioned for, was granted and accepted from the selectmen of a town under Pub. Sts. c. 113, § 7, a location for its tracks subject to certain restrictions which at that time were lawful, and thereupon under § 8 became established as a corporation, having consented to come into being subject to such restrictions, cannot be heard to complain of them. *Selectmen of Clinton* v. *Worcester Consolidated Street Railway*, 279.

3. It was within the powers of the selectmen of Clinton, on petition under Pub. Sts. c. 113, § 7, by those intending to organize the Worcester and Clinton Street Railway Company in 1877, for a grant of location for the company's tracks, to impose, as a condition under which the grant should be made, a provision that the company should "provide to pupils in attendance upon the public schools, the State Normal School of Worcester, or any school in Worcester, transportation to such pupils at half price while going to and from school." The franchise of the corporation, which came into being under § 8 after acceptance of the location as granted and before September 30, 1898, was subject to the condition; and such acceptance of the location and subsequent creation of the corporation must be taken to be an admission by the corporation that the restrictions imposed by the selectmen were reasonable and for the public interest. *Ibid.*

4. On petition of those intending to organize the Worcester and Clinton Street Railway Company, the selectmen of Clinton in 1897, under Pub. Sts. c. 113, § 7, granted a location for the company's tracks, subject to a restriction which was in the following language: "Said company further agrees to provide to pupils in attendance upon the public schools, the State Normal School of Worcester or any School in Worcester, transportation to such pupils at half price while going to and from school." The grant was accepted and the corporation established under § 8 before September 30, 1898. In accordance with St. 1897, c. 269, § 1, that company thereafter by deed sold all its property and franchises to the Leominster and Clinton Street Railway Company, and the latter to the Worcester Consolidated Street Railway Company, the grantee in each deed agreeing to assume and perform all obligations and contracts of the grantor. In 1906, the Worcester Consolidated Street Railway Company refused longer to carry upon its cars at a half fare rate students attending the State Normal School, Holy Cross College, and the Worcester Business Institute. Both of the latter institutions were supported by private funds, the former of the two being an institution for higher education, and the

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latter an institution for the teaching of such subjects as bookkeeping, shorthand, typewriting, commercial law, business and business methods. The selectmen of Clinton by a bill in equity sought a mandatory injunction commanding the company to transport students attending the three institutions from Clinton to the institutions and return at a half fare rate. *Held*, that, as to pupils at the State Normal School at Worcester, the restriction was enforceable against the defendant, and accordingly the mandatory injunction sought with regard to such pupils should issue; but that no injunction should issue as to the transportation of students attending the other two institutions, since they did not come within the description, "pupils . . . in attendance upon any school in Worcester." *Selectmen of Clinton* v. *Worcester Consolidated Street Railway*, 279.

Wrongful Discontinuance of Use of Track.

5. St. 1906, c. 463, Part III. § 76, providing that, "if a street railway company without right or lawful excuse discontinues the use of any track and when requested . . . refuses to operate the same," the mayor of the city or the selectmen of the town in which the track is located may compel such company to resume the use of the track by petition to the Supreme Judicial Court, was intended to and does give redress for such a wrongful discontinuance happening before the passage of the statute. *Selectmen of Amesbury* v. *Citizens Electric Street Railway*, 394.

6. Where by its original charter the right of a certain street railway company to lay its tracks upon the public streets was made subject to the determination of the authorities of the respective municipalities in which such streets lay, and such authorities, after one year from the opening of the tracks for use, might at their pleasure revoke such location, upon which revocation the tracks must be taken up, and where, as to the location granted by the authorities of a certain town, there was no agreement or statutory enactment requiring such company to continue the use of its tracks in the town as a condition of the grant of location therein, a discontinuance of such use is not "without right or lawful excuse" and gives to such town no right by petition to ehe Supreme Judicial Court under St. 1906, c. 463, Part III. § 76, to compel a resumption of the use of the track. *Ibid.*

Passenger.

7. If, after having discharged all its passengers at the end of its route, a street railway car has started without passengers to return to the car barn, there is, while it is in motion, no offer to accept any one as a passenger, and one who persists in an attempt to enter the car, understanding that the conductor refuses to receive him as such, and takes hold of the "grab irons" by the entrance steps, is a trespasser, and the conductor has a right to use a reasonable degree of force to prevent him from entering the car or continuing his hold upon it. *Sullivan* v. *Boston Elevated Railway*, 73.

Liability of street railway company for injury to passenger, see NEGLIGENCE, 12–16.

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Duties as User of Highway.

Liability of street railway company for injury to person in highway, see NEGLIGENCE, 17, 18.

STRIKE.

Rulings by judge presiding at trial of action for breach of contract to deliver coal, regarding effect of "strike" clause in contract, see PRACTICE, CIVIL, 8.

Effect of such clause in contract, see CONTRACT, 26.

SUNDAY.

Agreement in writing to cancel insurance policy is invalid if signed and delivered on Sunday, see CONTRACT, 23.

SUPERIOR COURT.

Powers of court as to placing on file indictment or complaint for commission of crime, and as to dismissing case where defendant has been on probation and object of probation has been accomplished, see PRACTICE, CRIMINAL, 7, 8.

SUPREME JUDICIAL COURT.

Single justice of Supreme Judicial Court in proper exercise of his discretion may refuse to dismiss without prejudice bill filed under R. L. c. 163, § 17, seeking reversal of decree of Court of Insolvency, see EQUITY PLEADING AND PRACTICE, 11.

TAKING.

Facts held to show taking by Pittsfield of waters of certain brook for purposes of its water supply, see PITTSFIELD, 2.

TAX.

Assessment.

Where assessment of tax for street watering purposes under R. L. c. 26, §§ 26, 27, is unwarranted or excessive, remedy is by application for abatement, see *post*, 2, 3, 6.

Abatement.

Application for abatement is proper remedy for owner of land upon which unwarranted or excessive assessment of tax for street watering purposes under R. L. c. 26, §§ 26, 27, has been made, see *post*, 2, 3, 6.

Excise.

1. In computing the amount of the excise tax which the Boston Elevated Railway Company is required to pay by St. 1907, c. 500, § 10, which, un-

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less the annual dividend paid by the corporation in that year exceeds six per cent "shall be a sum equal to seven eighths of one per cent of the gross earnings of all the lines of elevated or surface railroads owned, leased or operated by said corporation," the "gross earnings" by which the amount of the excise tax is to be determined are those accruing from all lines of railway operated by the corporation in the prosecution of its business as a common carrier, excluding all income received from other corporate property. *Boston Elevated Railway* v. *Commonwealth*, 96.

Street Watering.

2. R. L. c. 26, §§ 26, 27, providing for a tax upon estates abutting upon streets which a city has determined to water, is not unconstitutional in not giving the owner of such an estate an opportunity to be heard in regard to the assessment, since § 27 provides that such assessment in many specified particulars shall be like the annual tax upon property and "shall be a part of the tax for that year on such" estates, "but the assessors shall make no abatement thereof except upon the recommendation of the board or officer by whom," under § 26, a list, containing information for their guidance in making the assessment, was certified to them; and thus by implication gives to persons assessed a right to be heard before the assessors upon an application for an abatement, and also a right, upon an application for a recommendation of an abatement to the board or officer who certified the list to the assessor, to be heard upon all questions affecting the validity and amount of the assessment, and it is the duty of such board or officer to give the recommendation, and the duty of the assessors to make the abatement, if, upon a hearing, the assessment seems to be unwarranted or excessive. *Corcoran* v. *Aldermen of Cambridge*, 5.
3. An assessment of a tax for street watering, assumed to have been made under R. L. c. 26, §§ 26, 27, upon vacant, unimproved land is illegal, and, upon application made to the assessors for an abatement and to the board or officer, whom the board of aldermen had designated to certify to the assessors for their guidance in assessing the tax the lists specified in § 26, for a recommendation of an abatement, it would be the duty of such board or officer to make the recommendation, and of the assessors to make the abatement. *Ibid.*
4. Where assessments of a tax for street watering have been made under R. L. c. 26, §§ 26, 27, according to the linear feet of frontage upon the streets watered of various parcels of land of different sizes and shapes, situated in different portions of a city under different conditions of travel, occupation and population and upon streets of varying widths, while full effect must be given in all ordinary cases to the legislative determination that such assessment, where conditions are similar, is as nearly proportional and equal as is reasonably practicable, nevertheless, if it appears that an assessment made in this way will impose upon any property a liability substantially in excess of the special benefits conferred, such an assessment cannot lawfully be made. *Ibid.*
5. In making the estimate of the cost of watering the streets of a city for the purpose of an assessment upon abutters under R. L. c. 26, §§ 26, 27,

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it is proper to include the value of water used from the city's waterworks by the department which had charge of the watering, although there never was any charge made as to such water as between the departments. *Corcoran* v. *Aldermen of Cambridge*, 5.

6. At the hearing of a petition for a writ of certiorari to quash an assessment of a tax for street watering assumed to have been made under R. L. c. 26, §§ 26, 27, by a city, it appeared that the total tax assessed for this purpose was $34,000, of which $564 was assessed upon estates of the petitioners, that the estates of the petitioners were parcels of land of different sizes and shapes, situated in different portions of the city, under different conditions of travel, occupation and population and on streets of varying widths, that $19 of the tax was assessed illegally on the land of one of the petitioners because the land was vacant and unimproved. *Held*, that there was not shown such a departure from the correct application of the statute as to require the quashing of the entire assessment as illegal, and that the petitioners had no remedy except by proceedings for an abatement. *Ibid.*

7. Assuming to act under the provisions of R. L. c. 26, § 26, the board of aldermen of a city, without first having determined by vote that the whole or any part of the streets of the city should be watered at the expense of the abutters, passed an order on March 5 of a certain year estimating the expense of the watering as $40,000, directing that four fifths of the expense be borne by abutters and that the rate of the tax assessed be four cents per linear foot of frontage upon the abutting estates, and designating the superintendent of streets as the officer to determine the amount of the assessment upon each estate and to make the lists required by § 26 and to commit them to the assessors. The vote was approved by the mayor on March 7. On April 2 the board of aldermen adopted an order determining that "all the public ways within the limits of the city" should be watered. At some time before September 16, the exact date not more definitely appearing, the superintendent of streets made the lists required by § 26 but kept them in his office, which was directly under that of the assessors, where the latter had access to them. The assessors had upon their own books all of the details contained in the superintendent's books. The assessors made an assessment upon abutters amounting to $34,278.58 on August 31, at the rate of four cents per linear foot. On September 16 the superintendent of streets gave to the assessors a certificate that "the amount of street watering assessment as shown by the detailed books in this office is $34,278.58," and stated the amount to be assessed by wards. It appeared that the net expense of such watering was $38,440.66, which included the value of water used for the purpose from the city's waterworks, $8,273.52. *Held*, that no such irregularity appeared in the assessment as to justify the issuance of a writ of certiorari quashing it. *Ibid.*

Tax Sale.

Action under R. L. c. 13, § 44, to cause repayment to plaintiff of amount paid by him for deed of land sold at tax sale to another, which deed at suggestion of tax collector he had received and paid for, see *post*, 8, 9.

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Such action cannot be maintained if purchaser before bringing it has delivered to another a quitclaim deed purporting to convey all his right, title and interest in the land, see *post*, 9.

Action to Reimburse Purchaser at Invalid Tax Sale.

8. The collector of taxes of a city, at an auction sale of real estate for non-payment of taxes for a certain year conducted in accordance with the formalities prescribed in R. L. c. 13, struck off certain real estate to one B., and, at a sale held subsequently on the same day for non-payment of the taxes for the next year, struck off the same real estate to one H. At the suggestion of the collector, H. and B. agreed that H. should be written into the deed as the highest bidder and the purchaser at the first sale, and the collector so made the deed and H. paid the amount for which B. had bid in the real estate and received a deed. No deed was given to B. H. died and his administrator, after having made the offer in writing required by R. L. c. 13, § 44, to surrender and discharge the deed or to assign and transfer to the city all the right, title and interest which formerly were H.'s in the premises, as the collector might elect, brought an action of contract under the above named section of the statute to recover from the city the amount paid to the collector by H., alleging that H. was the purchaser at the sale and, by reason of an error, omission or informality therein, had had no claim upon the property sold. *Held*, that H. was a "purchaser" within the meaning of § 44, that he acquired no title as against the owner of the real estate and had no claim upon the property sold, that the plaintiff did not have to prove an ouster in order to maintain the action, and was not estopped by H.'s agreement with B., made at the suggestion of the collector, to prove the facts upon which he relied. *Spring* v. *Cambridge*, 1.
9. In an action against a city by a purchaser at a tax sale to recover under R. L. c. 13, § 44, the amount paid by the plaintiff for a tax title, it appeared that, by reason of an error, omission or informality in the sale, the plaintiff had no claim upon the land, that, in accordance with the statute, the plaintiff had offered in writing to surrender and discharge his deed and to assign and transfer to the city all his right, title and interest in the premises, as the collector of taxes might elect, but that his offer had been refused. The defendant offered in evidence, and the judge excluded, a quitclaim deed dated after the making and the refusal of the offer to the collector, but before the bringing of the action, which purported to convey to a third person all the right, title and interest of the plaintiff in the premises described in the collector's deed to him. *Held*, that the evidence should have been admitted, since the statute contemplates that one seeking its aid to recover money paid for such an invalid deed shall be in a position to "surrender and discharge" the deed or to assign and transfer to the city such right, title and interest in the premises as he procured from the tax sale transaction, if the collector shall so elect. *Ibid.*

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TIDE MILL.

Owner of tide mill and mill dam on natural watercourse has as much right to use of such watercourse as owner of ordinary mill has to use of waters of natural flowing stream upon which he is located, see WATERCOURSE, 2.

For application of this principle to taking of such rights of owner of tide mill on Mill River in constructing waterworks for Rockport, under St. 1894, c. 78, § 4, see WATERCOURSE, 3.

TOWNS.

See MUNICIPAL CORPORATIONS.

TREASURER OF THE COMMONWEALTH.

Construction of §§ 13, 19 of charter of Boston Elevated Railway Company, St. 1895, c. 518, with regard to fund held by treasurer of Commonwealth and time when, on application by company to Supreme Judicial Court, he should return it to company, see BOSTON ELEVATED RAILWAY COMPANY.

TRESPASS.

Person who insists against conductor's objection upon boarding street car which, after having discharged all its passengers at end of route, is proceeding without stopping to car barn, is trespasser, see STREET RAILWAY, 7.

Remedy for recovery of damages resulting to owner of land from temporary use of land in course of abolition of grade crossing near by is by action of tort and not by petition under St. 1906, c. 463 Part I. § 37, see DAMAGES, 7.

TRUST.

What constitutes.

1. In a suit in equity to establish a trust for the benefit of the plaintiffs in a sum of $400,000 alleged to be the proceeds of a transfer of the charter and control of the Boston Elevated Railway Company, the plaintiffs were stockholders of the Meigs Elevated Railway Company and contended that the stockholders of that company employed two of the persons who afterwards became incorporators of the Boston Elevated Railway Company as their attorneys to procure the incorporation of the last named company, and that such incorporators stood in a fiduciary relation toward the plaintiffs. A master to whom the case was referred found that the incorporators in question were not employed as such attorneys, and that no fiduciary relation existed between the plaintiffs and any of the defendants, but that the incorporators and the other persons who worked to procure the charter of the Boston Elevated Railway Company did so for their own purposes and in no way as representing the interests of the plaintiffs. A

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single justice confirmed the master's report and dismissed the bill, and on appeal this decree was affirmed by the full court. *Dobbins* v. *Peabody*, 141.
What constitutes resulting trust, see *post*, 2, 8.

Resulting.

2. Where one buys and pays for real estate but the title is conveyed to another, a trust results in favor of him who pays the purchase money, even if he has borrowed the money for the purpose from the grantee. *Howe* v. *Howe*, 598.
3. A bill in equity by an executrix, seeking to establish a resulting trust in certain real estate in favor of the plaintiff's testator, averred that at the time of the purchase of the real estate in question the entire purchase money was paid by the plaintiff's testator, who thereafter until his death occupied the real estate and received all the rents and profits, that the conveyance was made to one M., who never occupied or used the premises or received any benefit therefrom and who held the title for the benefit of the plaintiff's testator and thereafter at his request conveyed the real estate to one W. H. without consideration, it being understood and agreed between the plaintiff's testator and W. H. that the latter was holding the title for the benefit of the former, and that later, at the request of the plaintiff's testator, W. H. conveyed the premises without consideration to the defendant, the son of the plaintiff's testator, who never occupied the premises or received any income or rent from them but held the legal title for the use and benefit of his father, the plaintiff's testator, as M. and W. H. had done previously. *Held*, that these allegations sufficiently stated a resulting trust. *Ibid.*
4. Where a resulting trust is created by the payment of the purchase money for real estate, the title to which is taken in the name of another, the trust does not lose its character by the transfer of the title by the trustee to another person who takes with notice of the trust. Such a conveyance, which merely substitutes one trustee for another, requires no consideration to support it. *Ibid.*
5. The statute of frauds does not prevent the establishment of a resulting trust by proving by oral evidence that the purchase money for real estate was paid by a person other than the one in whose name the title was taken. Nor is there anything in the statute of frauds which requires any writing to continue the existence of such a trust when a new trustee is selected to whom the property is conveyed with notice of the trust. *Ibid.*
6. In a suit in equity where it is incumbent on the plaintiff to show that the defendant accepted a certain conveyance of real estate with notice of a resulting trust in favor of the plaintiff's testator, where there is testimony tending to show a recognition of the obligation of the trust on the part of the defendant, which however is to be treated with caution and discrimination on account of the interest of the witnesses, if the defendant is in court and fails to testify personally or to call any witnesses in his behalf, such omission to offer evidence within his reach to control or explain the evidence for the plaintiff on this issue may be regarded as conduct in the

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Trust (*continued*).

nature of an admission which may be given consideration. *Howe* v. *Howe*, 598.

7. If a conveyance of real estate, already subject to a resulting trust, made without consideration to the son of the beneficial owner, creates any presumption that it was made as a gift to the son in token of parental affection, and was not conveyed to him to hold as trustee for his father, the inference is merely one which the law permits to be drawn from unexplained facts, and may be overcome by evidence showing the real situation to be otherwise; and where the son to whom the conveyance is made is of middle age and is in business on his own account, and the beneficial owner also has a wife and other sons, one of them barely of age, he presumption is very weak, even when not rebutted, as in the present case, by evidence tending to show that son took the title with express notice of the trust and for the purpose of holding the property for the benefit of his father. *Ibid.*

8. The beneficiary of a resulting trust in real estate, determinable at his pleasure, who has enjoyed the benefits of the trust during his life without exercising his right to bring the trust to an end, is guilty of no laches in failing to terminate the trust, and the executor of his will is free to bring a suit in equity to establish the trust. *Ibid.*

9. One who received a conveyance of real estate subject to a resulting trust, and after acting for a time as trustee conveyed the real estate to a new trustee to act in his stead, and who afterwards upon the death of the beneficiary became himself one of the beneficiaries of the trust, is in no way estopped from joining as one of the plaintiffs in a suit in equity to establish the resulting trust against the person to whom he conveyed the property as trustee. *Ibid.*

Constructive.

10. Where the owner of land conveys it by a deed absolute in form to one who receives it under a parol agreement that the grantee shall hold it to secure the payment of a debt due him from the grantor, such agreement may be discharged without an instrument in writing by a subsequent parol agreement which leaves the title absolute in accordance with the terms of the deed. *Sears* v. *Gilman*, 384.

For application of this principle resulting in dismissal of bill to enforce accounting and reconveyance under original agreement, see EQUITY JURISDICTION, 12.

Accountability of Trustee.

Suit against assignee of plaintiff for benefit of his creditors involving questions whether assignees had properly executed trust, see ASSIGNMENT, 1, 2.

Case involving question whether certain transactions of trustee were intended to be assignment of mortgage, which would have been outside his powers, or were discharge of mortgage, which was within his powers, see MORTGAGE.

Suit in equity for accounting brought by one who formerly had owned equity of redemption of certain property which, at his request and for his benefit, defendant had purchased at foreclosure sale, involving questions of interest and of allowances proper to be credited to defendant for disbursements for benefit of property, see EQUITY JURISDICTION, 9–11.

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UNFAIR COMPETITION.

In a suit in equity by a corporation engaged in business as a wholesale baker against the members of a firm of wholesale bakers, to restrain the defendants from unfair competition with the business of the plaintiff by selling loaves of bread made in imitation of bread manufactured and sold by the plaintiff, it appeared that the bread made and sold by the plaintiff was called "Creamalt" and that the loaves were of a size, shape, color and condition of surface which gave them a peculiar visual appearance that had come to be recognized by customers in connection with the name as indicating the place of manufacture and the quality of the bread, and that a very valuable good will had been acquired by the plaintiff in connection with the manufacture and sale of this bread, that the defendants began to manufacture and sell bread in loaves of the same size, shape, color and general visual appearance as the plaintiff's, so that an ordinary purchaser, not making a careful examination, would be likely to be deceived and to buy the defendants' bread in the belief that it was the same kind that he previously had bought of the plaintiff's manufacture, and there was evidence that the defendants' loaves were used by retailers for the purpose of such deceit, that the shape of the plaintiff's loaves was an oval one, which, although not entirely new, was uncommon, was uneconomical and less convenient for the cutting of slices and other purposes than the shapes generally adopted, and there was nothing to show that the defendants' business interests, apart from a purpose to deceive, required the combination of this shape with the size, color and general visual appearance that had become associated with the plaintiff's trade in "Creamalt" bread, that each of the plaintiff's loaves had on the top a small paper label containing the words "Fox's Creamalt," that the defendants on each of their loaves put a broad paper band marked "Hathaway's Log Cabin Bread, Finest Flavor, Malted," that these bands were loose and not closely attached to the loaves, so that the bands were likely not to go with the loaves from the retailer to the customer unless the retailer was careful to preserve them, and if the retailer had an inclination to palm off the defendants' loaves for those of the plaintiff the loose bands would have no tendency to prevent this. *Held*, that the defendants unnecessarily, with no apparent reason except to take advantage of the reputation built up by the plaintiff, had produced and put upon the market an imitation of the plaintiff's loaves adapted to be used in deceiving that part of the public who had only a general knowledge and recollection of that which had been recommended to them or which they had been accustomed to buy, and a decree of the trial court dismissing the plaintiff's bill was reversed. *George G. Fox Co. v. Hathaway*, 89.

UNLAWFUL INTERFERENCE.

1. The doctrine of *May v. Wood*, 172 Mass. 11, and of *Rice v. Albee*, 164 Mass. 88, that a declaration alleging that the defendant by false and malicious statements induced a third person to discharge the plaintiff or not to

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employ him must set out the statements in substance, is not to be extended beyond cases brought for slander or libel, and does not apply to an action for maliciously inducing a third person to break his contract with the plaintiff. *McGurk* v. *Cronenwett*, 457.

2. In an action for maliciously inducing a third person to break his contract with the plaintiff, it is not necessary that the declaration should set out the contract in full or by copy. A statement of its effect so far as material to the case is sufficient. *Ibid.*

3. In an action for maliciously inducing a corporation to break its contract with the plaintiff, the declaration need not allege that the defendant was a stranger to the contract and was not an officer or a person in authority representing the corporation, as in either of those cases the defendant would be liable if the charges in the declaration were proved. *Ibid.*

4. In an action for maliciously inducing a corporation to break its contract with the plaintiff under which he was employed as its sales manager, if a count of the declaration, after describing the contract, alleges that at a certain date "the defendant maliciously induced and persuaded said company to break said agreement and discharge the plaintiff from its employ thereunder," this with the preceding allegations states a cause of action, and the count will not be held to be bad for the lack of a direct averment that the corporation discharged the plaintiff in consequence of what the defendant did, where this is not stated as one of the grounds of demurrer. If the defendant regards the averments of the count as too meagre he has the right to ask for a bill of particulars under R. L. c. 173, § 68. *Ibid.*

5. In order to maintain an action for purposely and maliciously preventing the performance of a contract, where this is the sole cause of action relied on, it is necessary to aver and prove that the defendant knew of the contract. *Ibid.*

6. A declaration alleging, that the plaintiff was employed by a corporation as its sales manager under an agreement in writing, and that the defendant "wrongfully without cause and maliciously prevented the plaintiff from further performing his obligation under" such contract of employment, and thus "brought about the discharge of the plaintiff" and caused the plaintiff great damage, states no cause of action, for want of an averment that the defendant knew of the existence of the agreement. Such an averment is not supplied by the use of the word "maliciously" which signifies only that the defendant's act was done intentionally without just cause or excuse and does not aver by necessary implication a knowledge of the agreement. *Ibid.*

7. At the hearing on a petition for an attachment for contempt in the violation of a temporary injunction issued in a suit brought by a firm of contractors against the members of various labor organizations to restrain them from interfering with the plaintiff's business by intimidating or interfering with any person in his employment, it appeared that the respondents were respectively the president and business agent of a district council made up of delegates of several local unions, and that they were named in, and had had served upon them the injunction alleged to have been violated; that one P., the "business agent" of one of the local unions

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whose delegates composed the district council, interviewed one of the petitioner's workmen and told him to leave the work because the petitioner was an "unfair" firm, that thereafter the workman received a notice signed by one W., the secretary of the district council, stating that charges had been made against him for violating an article of the council's constitution in working for an "unfair" firm after having been told by a business agent to leave the work, which article subjected the workman to a fine for so doing. The notice further directed the workman to attend a meeting of the council. At that meeting, one respondent presided and the other acted as temporary secretary. Neither P. nor W. was present. The judge who heard the case found from the foregoing facts that the respondents were responsible for the notice sent to the petitioner's workman, adjudged them in contempt for that offense and imposed fines. *Held*, that the fines should be returned to the respondents, since there was no evidence that would warrant a finding that they took any part directly or indirectly in the issuing of the notice. *Casson* v. *McIntosh*, 443.

USE.

Construction of deed creating a shifting use, see DEED.

UTTERING FORGED INSTRUMENT.

What is sufficient indictment for uttering forged instrument under R. L. c. 218, § 67, see PLEADING, CRIMINAL.

VERDICT.

Order of judge directing verdict sustained on ground not urged at trial, see PRACTICE, CIVIL, 9, 10.

Verdict of jury must be conscientious verdict of each member, and charge of judge which is subject to different construction is erroneous, see PRACTICE, CIVIL, 7.

WAGERING CONTRACTS.

1. R. L. c. 99, § 4, giving the right to recover money paid on margins under the wagering contracts described in that section, does not apply to contracts made outside this Commonwealth. *Bourse* v. *McLean*, 242.
2. R. L. c. 74, § 7, making void a contract for the sale of securities unless the person contracting to sell them is the owner or assignee or is authorized to sell by the owner or assignee or his agent, applies only to contracts made in this Commonwealth. *Ibid.*

WAIVER.

Of provisions in building contract, see CONTRACT, 19, 21.

Failure of one, to whom coal was to be delivered in accordance with a contract in writing, to "go into open market and buy" as permitted by

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Waiver (*continued*).

terms of contract in case of failure of seller to deliver, held not to be under circumstances waiver of right to claim damages for failure to deliver, see CONTRACT, 8.

Other acts of plaintiff in such case which were held not to amount to waiver of right to recover damages for breach of contract, see CONTRACT, 25, 27.

Case involving question whether there was evidence at trial that street railway company, under circumstances shown, had waived rule, implied by establishment of regular stopping places, that passengers were to alight at such stopping places only, see NEGLIGENCE, 15, 16.

WAREHOUSEMAN.

Lien of railroad corporation on pedler's pack, attempted to be carried as baggage, for charges for storage as well as for transportation, see CARRIER, 4.

Suit in equity cannot be maintained by owner of certain goods against railroad company, in whose possession as warehouseman goods were destroyed by lightning, and insurance company which had issued to railroad company policy "attaching upon property, interest and legal liability" of railroad company and including property of all kinds held by railroad company either as carrier or warehouseman "for which insured may be legally liable," to have insurance of interest of railroad company applied for his benefit, see INSURANCE, 2.

WATERCOURSE.

1. A brook which is an outlet of a great pond, through which water of the pond has flowed to the sea for more than two hundred years with the acquiescence of all persons, has acquired the character of a natural watercourse, although the outlet connecting the brook with the great pond originally may have been an artificial channel. *Dodge* v. *Rockport*, 274.
2. The owner of a tide mill and mill dam making use of the waters of a natural watercourse, or of a stream which has acquired the character of a natural watercourse, has as much right to use the water in the way that he does as the owner of an ordinary mill has to use the water of a flowing stream in the usual way, and the fact that his dam is below high water mark and that his mill accordingly is operated as a tide mill affects the manner of his use of the water but not his right to use it. *Ibid.*
3. Section 4 of St. 1894, c. 78, an act to supply the town of Rockport with water, provides that "Said town shall pay all damages sustained by any person or corporation in property by the taking of any land, right of way, water source, water right or easement, or by any other thing done by said town under the authority of this act." The town under the provisions of the act took the waters of Cape Pond, a great pond. The owner of a tide mill and mill dam on Mill River filed a petition for damages under the act. It appeared that a brook called Alewife Brook, one branch of which comes from Cape Pond, flows into Mill River above the petitioner's dam,

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that the water of Alewife Brook thus flowed into the pond created by the petitioner's dam, raising its level to a higher point and for a longer time than otherwise would be the case, and that this flow was diminished seriously by the taking of the waters of Cape Pond by the respondent. There was evidence that the present outlet of Cape Pond into Alewife Brook was the original and natural one, but there was other evidence that this outlet originally was merely an artificial channel dug before the year 1700, although it was not disputed that the waters had flowed in their present channel for more than two hundred years. The presiding judge refused to instruct the jury that if they found that the brook connecting Cape Pond with Alewife Brook was not a natural watercourse but an artificial channel the petition could not be maintained, and submitted to the jury the question whether the brook would in the course of nature flow at low tide across the flats upon which the petitioner's dam was constructed if no dam were there. *Held*, that the refusal of the instruction requested and the submission to the jury were correct; that as the brook had flowed in its present course for more than two hundred years and all persons had acquiesced in that condition it had acquired the character of a natural watercourse and it was immaterial whether the outlet from Cape Pond originally was natural or artificial; that the rights of the petitioner were as great as those of an ordinary riparian owner; that the fact that his dam was below high water mark and that his mill accordingly was operated as a tide mill, affected only the manner in which he made use of the water and not his right to use it; and that the damages caused by the diminution of the flow of water into the petitioner's mill pond could be found to be the direct and proximate result of the taking and not too remote to be recovered. *Dodge* v. *Rockport*, 274.

Legislature may require compensation for use of waters of Great Pond for a public purpose, such as water supply of a town, see GREAT POND.

Taking by Pittsfield under St. 1892, c. 185, of waters of brook for purposes of water supply, see PITTSFIELD, 2. Such taking does not give owner right of action in tort, see DAMAGES, 6.

WATER SUPPLY.

Acceptance by Pittsfield of St. 1892, c. 185, regarding water supply of Pittsfield and taking of water of brook in accordance therewith, see PITTSFIELD, 1, 2.

Damages allowed for taking of water rights of owner of tide mill for purpose of water supply of Rockport, see WATERCOURSE, 3; DAMAGES, 5.

WATERWORKS.

Acts of water board of Lowell in compelling users of water for private fire service systems to use meters supplied by city at owner's expense held within their powers and reasonable under circumstances, see MUNICIPAL CORPORATIONS, 1.

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Damages allowed for taking of water rights of owner of tide mill on Mill River for construction of waterworks for Rockport under St. 1894, c. 78, § 4, see WATERCOURSE, 3; DAMAGES, 5.

Taking of waters of brook by Pittsfield for purposes of its works, see PITTSFIELD, 1, 2.

WAY.

Private.

Construction of certain deeds with reference to whether they contained provisions for private right of way, see EASEMENT, 1, 2.

Suit in equity to restrain infringement on such way, see EQUITY JURISDICTION, 22.

The owner of the fee in a lot of land, who arches over and builds above a passageway crossing his lot in which the owners of other lots have rights of way, must leave such openings for light and ventilation as are necessary for the convenient use of the way by the owners of the easement, see EQUITY JURISDICTION, 22.

Judgment of Land Court, on petition for registration of title of land which is bounded by private way bounding other lots also, fixing lines of way where it bounds on land whose title is registered, does not fix lines of way as to other lots, see LAND REGISTRATION.

Public.

Relocation.

R. L. c. 48, § 97, is directory and not mandatory, and a failure of the authorities of a town to cause a description and plan of land taken to widen a public street to be filed in the registry of deeds as directed by that statute within sixty days after a vote of the town accepting the relocation does not affect the validity of the acts of the town in taking the land and widening the street. *Beckford* v. *Needham*, 369.

Liability for maintenance of nuisance.

Liability of owner of land who maintained on his premises nuisance which caused water to collect and freeze on sidewalk of public way and caused injury to traveller thereon, see NUISANCE, 1-4; MUNICIPAL CORPORATIONS, 2.

WEIGHTS AND MEASURES.

1. Under St. 1907, c. 535, providing that all scales, balances, computing scales and other devices having a device for indicating or registering the price as well as the weight of the commodity offered for sale, shall be tested by the sealers of weights and measures as to the correctness of both weights and values indicated by them, the correctness to be passed upon is purely arithmetical and the statute for that reason is constitutional. *Moneyweight Scale Co.* v. *McBride*, 503.

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2. St. 1907, c. 585, providing that all scales, balances, computing scales and other devices having a device for indicating or registering the price as well as the weight of the commodity offered for sale, shall be tested by the sealers of weights and measures as to the correctness of both weights and values indicated by them, requires that the values thus indicated shall be correct arithmetically and shall not disregard fractions of a cent. *Money-weight Scale Co.* v. *McBride*, 503.

It would be proper exercise of police power for Legislature to forbid sale of incorrect tables of value to be used by dealers as correct in making sales by pounds and ounces, see CONSTITUTIONAL LAW, 8.

WILL.

No jurisdiction in equity to "remould," reform or correct instrument already admitted to probate as will, see PROBATE COURT, 1, 2.

Suit for specific performance of agreement to compromise contest as to will, involving questions of consideration, construction, validity and performance of the agreement, see CONTRACT, 1, 3, 11, 29; EQUITY JURISDICTION, 4.

WITNESS.

Cross-examination.

At the trial of an action of tort against a street railway company for injuries alleged to have been received by the plaintiff by reason of his having been assaulted by the conductor of a car, upon which he was a passenger, and expelled therefrom with an unwarranted use of force, it appeared that the conductor, whose testimony tended to prove facts inconsistent with the plaintiff's allegations, had made no report of the accident to the defendant. The conductor testified in cross-examination that he had made no report because he considered the affair insignificant and that, under the defendant's rules, whether or not a conductor should make a report was left to his discretion. Against the objection and subject to exception by the defendant, he then was asked: "Don't you understand there is a rule applying to conductors that they shall make a report of an accident, no matter how insignificant?" and answered "Yes." *Held*, that the question was allowable in cross-examination as bearing on the conductor's real understanding of the rule, and thus to discredit his entire testimony. *Sullivan* v. *Boston Elevated Railway*, 73.

Contradiction.

Evidence introduced by plaintiff which establishes fact as to which witness for plaintiff had stated merely that he had no recollection, held not to be inadmissible as contradicting that witness, see EVIDENCE, 10.

Refreshing Recollection.

Where witness was shown certified copy of appraisal made by three appraisers of whom he was one, but stated that it did not refresh his recol-

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Witness (*continued*).

lection of articles appraised but that appraisal as made was true, copy rightly was admitted in evidence as statement of evidence intended to be given by witness, see EVIDENCE, 16.

Expert.

At trial of action for conversion of furniture, witness qualified to express opinion on question of value of furniture like that alleged to have been converted was allowed to be examined by hypothetical questions, although he never had seen the articles which were alleged to have been converted, see EVIDENCE, 6.

As to what questions properly may be put to expert, see also EVIDENCE, 7–9.

Failure to produce.

Inferences may be drawn from failure of defendant in criminal case to produce witnesses to testify on material matters of defense, see PRACTICE, CRIMINAL, 2; POSSESSION OF BURGLARIOUS IMPLEMENTS, 4.

Same rule applied in suit in equity, see TRUST, 6.

Answer not responsive.

Answer of witness which is not responsive to question must be taken to have been intended to stand by itself, see NEGLIGENCE, 15.

WORDS.

"Consent." See *Brown* v. *Haddock*, 480, 485.

"Discharge." See *Hill* v. *Arnold*, 109, 110.

"Exhausted." See *Cutting* v. *Atlas Mutual Ins. Co.* 380, 382.

"Gross earnings." See *Boston Elevated Railway* v. *Commonwealth*, 96, 99.

"Maliciously." See *McGurk* v. *Cronenwett*, 457, 461.

"Net profits." See *Thurston* v. *Hamblin*, 151, 158; *Stone* v. *Wright Wire Co.* 306, 307, 309.

"Owner." See *Moran* v. *Gallagher*, 486, 487.

"Practice of Medicine." See *Commonwealth* v. *Jewelle*, 558, 559.

"Preceding sections." See *Great Barrington* v. *Gibbons*, 527, 530.

"Prosecute." See *Great Barrington* v. *Gibbons*, 527, 529.

"Pupils." See *Selectmen of Clinton* v. *Worcester Consolidated Street Railway*, 279, 291.

"Purchaser." See *Spring* v. *Cambridge*, 1, 4.

"Remainder." See *Simonds* v. *Simonds*, 552, 557.

"Sale." See *Silversmiths Co.* v. *Reed & Barton Corp.* 371, 375.

"Schools." See *Selectmen of Clinton* v. *Worcester Consolidated Street Railway*, 279, 290.

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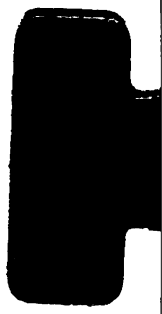

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